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No. 16470 ✓

VOL 3112

**United States
Court of Appeals**
For the Ninth Circuit

CARL E. OAKS, WILLIAMS BROTHERS COMPANY, McLAUGHLIN, INC., and MARWELL CONSTRUCTION COMPANY, LTD.,

Appellants,

vs.

STUART CONSTRUCTION CO., INC., a Corporation, and STUART E. TOPE,

Respondents.

Transcript of Record
In Two Volumes

Volume I
(Pages 1 to 342)

FILED

MAY 21 1939

PAUL P. O'BRIEN, CLERK

**Appeal from the District Court
of the District of Alaska,
Third Division**



No. 16470

United States
Court of Appeals
For the Ninth Circuit

CARL E. OAKS, WILLIAMS BROTHERS COMPANY, McLAUGHLIN, INC., and MARWELL CONSTRUCTION COMPANY, LTD.,

Appellants,

vs.

STUART CONSTRUCTION CO., INC., a Corporation, and STUART E. TOPE,

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Appeal from the District Court
of the District of Alaska,
Third Division

Supplemental Memorandum 67

Transcript of Proceedings 72

Witnesses, Defendants':

Abbott, Vincent H. (Deposition)

—direct 614

Beall, James W.

—direct 607

—cross 612

Crawford, Roy S. (Deposition)

—direct 540

—cross 574

—redirect 591, 594

—recross 592

Hancock, William Harris

—direct 471

—cross 507

—redirect 518

—recross 520

Lucas, Roy

—direct 595

—cross 600

—redirect 600, 601

—recross 601

McMahan, C. J.

—direct 522

—cross 534

—redirect 537

—recross 538

Witnesses, Defendants'—(Continued)

Oaks, Carl E.

—direct	637
—cross	662
—redirect	684
—recross	686

Tope, Stuart E.

—direct	602
—cross	605

Witnesses, Plaintiffs':

Allred, Sterling L. (Deposition)

—direct	449
—cross	457
—redirect	463

Bayless, John Howard

—direct	400
—cross	414
—redirect	419
—recross	420

Downs, Thomas K.

—direct	353
—cross	381
—redirect	396

Harlan, Arthur J.

—direct	422
—cross	433
—redirect	442, 467
—recross	445

Witnesses, Plaintiffs'—(Continued)

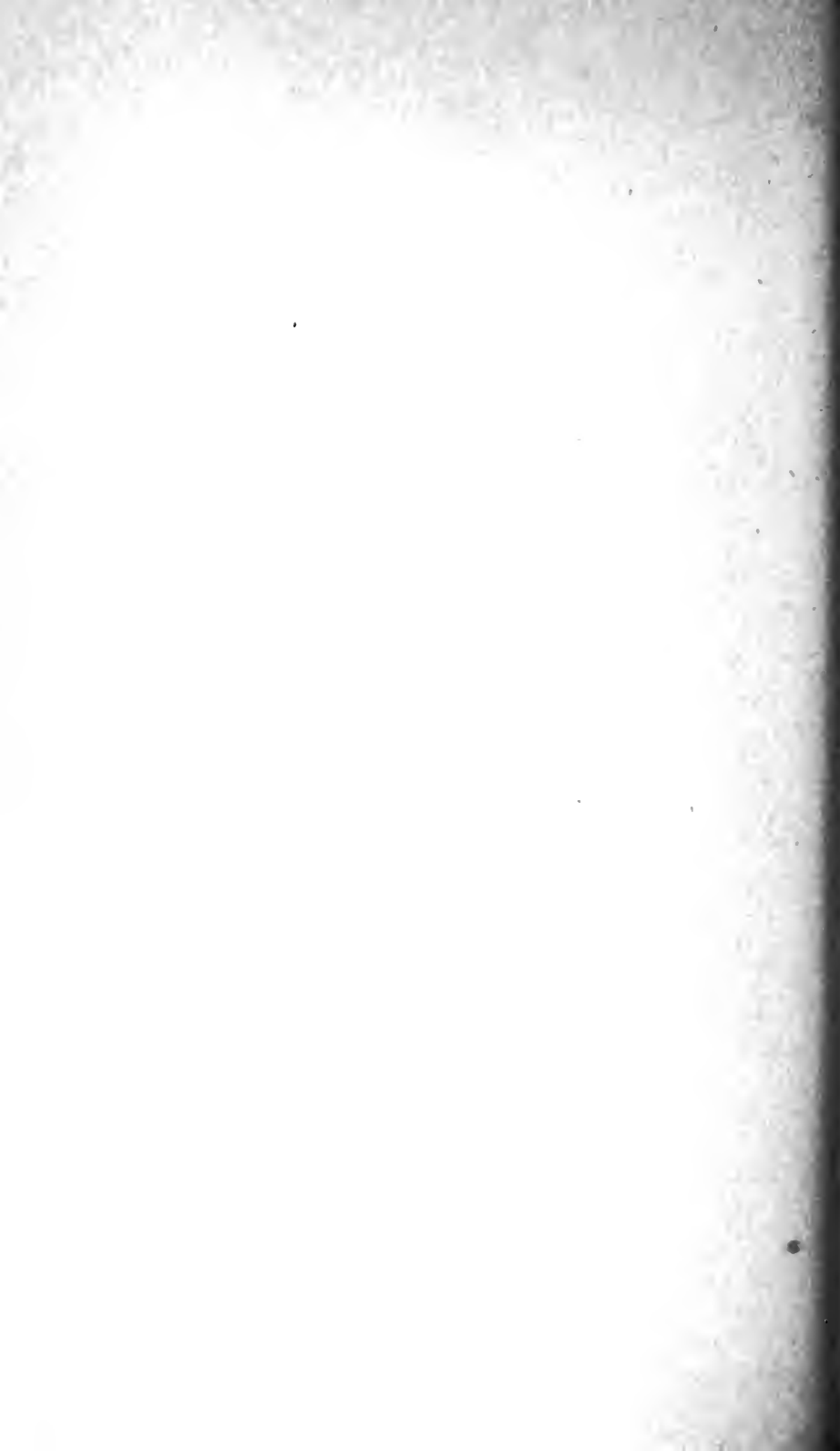
Hubbard, Wayne

—direct	222
—cross	227
—redirect	237

Tope, Stuart E.

—direct	126, 171, 688
—cross	204, 240, 290, 692
—redirect [X]	345





ATTORNEYS OF RECORD

ALLEN, DeGARMO & LEEDY,
STUART G. OLES,

1308 Northern Life Tower,
Seattle 1, Washington;

JOHN C. DUNN,

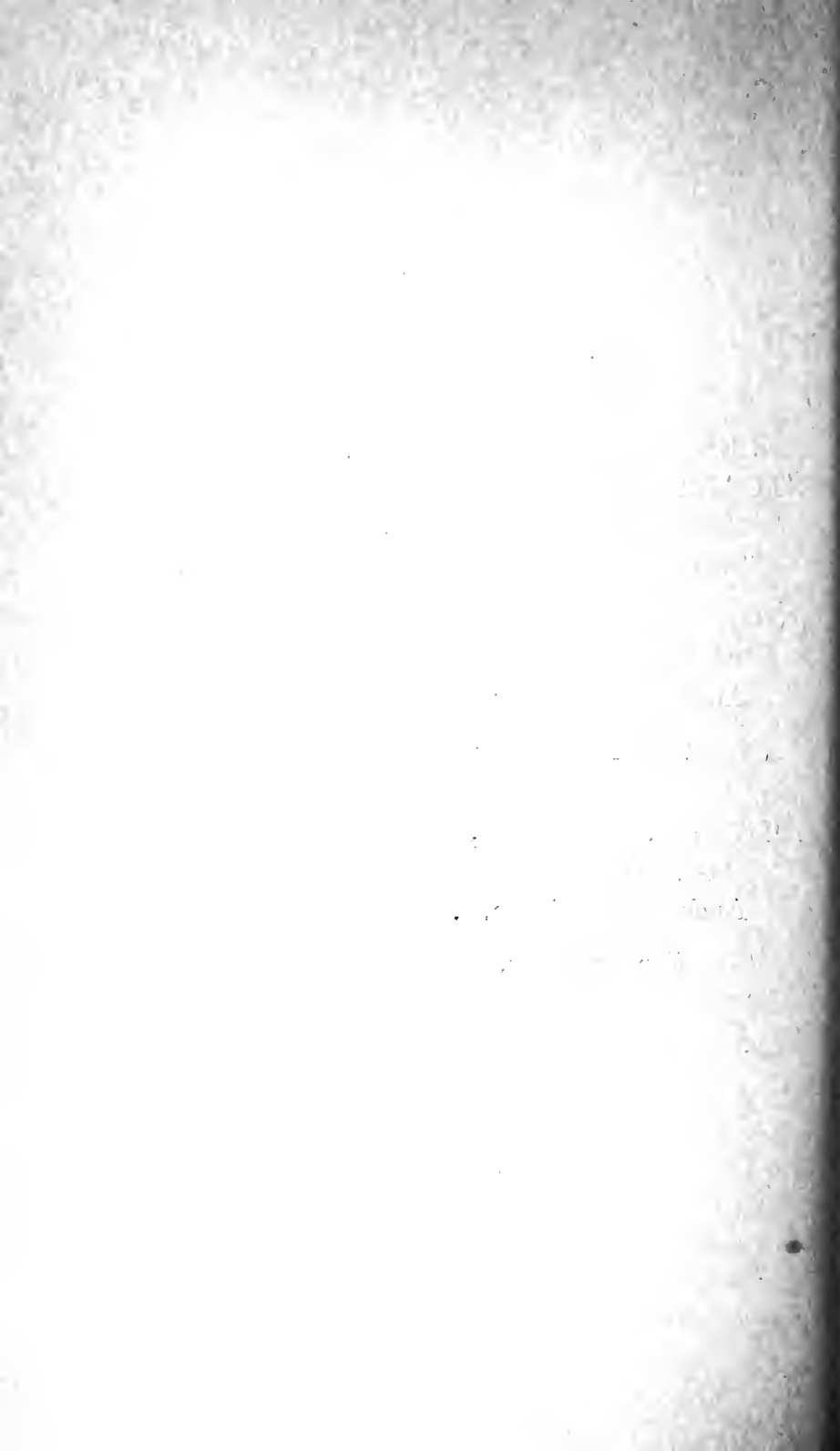
1st Nat'l Bank Bldg.,
Anchorage, Alaska,

For Appellants.

BUELL A. NESBETT,

Box 2257,
Anchorage, Alaska, .

For Appellee.



In the District Court for the District of
Alaska, Third Division

No. A-10,656

UNITED STATES OF AMERICA, for the Use
and Benefit of STUART CONSTRUCTION
CO., INC., a Corporation, and STUART E.
TOPE, an Individual,

Plaintiffs,

vs.

CARL E. OAKS, J. BUTCHER and J. E.
NOONAN, d/b/a Oaks Construction Com-
pany; WILLIAMS BROTHERS COM-
PANY; McLAUGHLIN, INC., and MAR-
WELL CONSTRUCTION COMPANY,
LTD.,

Defendants.

COMPLAINT

First Cause of Action

I.

That the plaintiff, Stuart Construction Co., Inc., is an Alaskan corporation and has complied with all Territorial requirements precedent to bringing this suit; that the defendants, Williams Brothers Company, McLaughlin, Inc., and Marwell Construction Company, Ltd., entered into a sub-contract with Williams-McLaughlin for a portion of the construction of the Pipeline Products System

from Haines to Fairbanks, Alaska, U. S. Army Corps of Engineers, Project No. ENG.-95-507-54-1, and that subsequently and on December 15, 1953, the defendant, Oaks Construction Company entered into a sub-contract with Williams Brothers Company for the clearing and grading of the Pipeline Products System and on December 17, 1953, the plaintiff, Stuart Construction Co., Inc., entered into a sub-contract with the defendant, Oaks Construction Company whereby the plaintiff corporation would furnish tools, labor, equipment and supplies to clear a portion of the right of way along said pipeline, a copy of said contract being attached hereto as Exhibit "A" and made a part hereof; that the defendant companies were bonded as provided by Title 40, U.S.C., Section 270A, that this cause of action is brought under the provisions of Title 40, USC 270B, and that one year has not elapsed after the date of final settlement of the above-mentioned contracts.

II.

That the plaintiff corporation performed according to the terms of said contract and has due and owing to it from the defendant, Oaks Construction Company, the sum of Fifty-three Thousand Six Hundred Twenty Dollars (\$53,620.00), which the defendant, Oaks Construction Company, refuses to pay.

Second and Alternative Cause of Action

I.

That the plaintiff, Stuart E. Tope, furnished equipment and rendered services to the defendant, Oaks Construction Company, in connection with the clearing of a right-of-way on the Haines to Fairbanks pipeline system of the reasonable value of Fifty-three Thousand Six Hundred Twenty Dollars (\$53,620.00) which the defendant, Oaks Construction Company, refuses to pay.

Wherefore, the plaintiff, Stuart Construction Co., Inc., prays for judgment against the defendants in the sum of Fifty-three Thousand Six Hundred Twenty Dollars (\$53,620.00) on its first cause of action, or, in the alternative, that the plaintiff, Stuart E. Tope, have judgment against the defendant, Oaks Construction Company, in the sum of Fifty-three Thousand Six Hundred Twenty Dollars (\$53,620.00) on the second cause of action; for costs, disbursements and a reasonable sum as attorneys' fees.

McCUTCHEON & NESBETT,

By /s/ BUELL A. NESBETT.

Duly verified.

EXHIBIT "A"

Oaks Construction Company
General Contractor

Agreement With
Stuart Construction Company
Box 517, Anchorage, Alaska

for

The furnishing of all tools, labor, equipment and supplies to clear a portion of the right of way of the Haines to Fairbanks, Alaska; Products Pipeline System, C. E. Project No. Eng-95-507-54-1, as hereinafter described.

Amount: \$5,000.00 or more or less at unit prices as shown herein.

Dated: December 17, 1953.

Date of Completion: One hundred and twenty calendar days.

Subcontract Agreement

This agreement made this 17th day of December, 1953, by and between:

Oaks Construction Company, party of the first part, hereinafter called Oaks, and

Stuart E. Tope as President of Stuart Construction Company, Inc., party of the second part, hereinafter called Subcontractor, which said Subcontractor is a corporation existing under the laws of the Territory of Alaska, doing business at Box 517,

anchorage, Alaska, under the firm name and style of Stuart Construction Company, Inc.

Witnesseth:

Whereas, the joint venture of Williams Brothers Company, McLaughlin, Inc., and Marwell Construction Company, Ltd., has heretofore entered into a subcontract with Williams-McLaughlin for a portion of the construction of the whole Pipeline Products System from Haines to Fairbanks, Alaska, U. S. Army Corps of Engineers, Project No. Eng-95-507-54-1 and

Whereas, Oaks Construction Company has heretofore entered into a subcontract with Williams Bros. dated December 15, 1953, involving clearing and grading on the above Products Pipeline system.

Now, therefore, in consideration of the covenants and agreements hereinafter contained and payments to be made as hereinafter provided, Oaks Construction Company and Stuart Construction Company, Inc., do hereby mutually agree as follows:

Article I. Performance of work.

The Subcontractor shall furnish all materials, supplies and equipment, except as otherwise herein provided, and perform all labor required for the completion of the said work in accordance with all provisions of the original contract and subcontracts and of the specifications and plans referred to

therein, all of which are hereby made a part of this agreement, and under the direction and to the satisfaction of the Principal's engineer or other authorized representative in charge of said work. The Subcontractor's employees shall not exceed the number required to do the work efficiently and within the time specified herein for the completion of the work, and the wages received by them shall be the same as that paid by the Contractor for similar work, excepting only as provided and described in Article XXI.

Article II.

To be bound by the terms of the subcontract between Oaks Construction Company and Williams Bros., including every part of and all the general and special conditions, drawings, specifications, and addenda in any way applicable to this subcontract; and also by the provisions of this contract which are hereby referred to and made a part of this subcontract.

Article III.

To assume toward Oaks Construction Company, so far as the Subcontract work is concerned, all the obligations and responsibilities which Oaks Construction Company assumes towards Williams Bros. by his Contract, which includes the general and specific conditions thereof, and the plans and specifications thereof, and the plans and specifications and addenda, and all modifications thereof

incorporated in the documents before their execution. The Subcontractor agrees not to assign or sublet said work or any portion thereof without the written consent of Oaks Construction Company.

Article IV.

To start work immediately when notified by the Contractor, and to complete the several portions and the whole of the work herein sublet, at such times as will enable Oaks Construction Company to fully comply with the contract with Williams Bros., and to be bound by any provisions in the Oaks-Williams Bros. Contract with Williams-McLaughlin for liquidated damages, if caused by the Subcontractor.

Article V.

To submit to Oaks Construction Company applications for payment at such reasonable times as to enable Oaks Construction Company to apply for and obtain payment from Williams Bros. and to receive payment from Oaks Construction Company as the work progresses, but only after the Oaks Construction Company shall have received payment from Williams Bros.

Article VI.

Oaks Construction Company may, without invalidating this Subcontract, order extra work or make changes by altering, adding to, or deducting from the work; the price herein being adjusted ac-

cordingly. All such work shall be executed under the conditions hereof, and of the Oaks-Williams Bros. Contract, except that any claim for extension of time caused thereby must be agreed upon at the time of ordering such change.

Article VII.

To make no claims for extras unless the same shall be fully agreed upon in writing by Oaks Construction Company prior to the performance of any such extra work, nor shall any extra work be allowed or paid for, in any event, unless the same is first allowed and paid for by the Williams Bros. to Oaks Construction Company.

Article VII.

That he has the status of an employer as defined by the Unemployment Compensation Act of the Territory, and all similar acts of the National Government, and including all Social Security Acts; that he will withhold from his payrolls the necessary Social Security and Unemployment reserves and pay the same; that Oaks Construction Company shall in no way be liable as an employer to or on account of any of the employees of the Subcontractor; that the Subcontractor will as an employer, to the extent of any of his employees under this Contract, conform to all the rules and regulations of the Social Security Acts and Unemployment Commission created by said laws, and that he will furnish satisfactory evidence to Oaks Construction Company that he is conforming to said

laws, rules and regulations. The Subcontractor hereby releases and indemnifies Oaks Construction Company from any and all liabilities under the said laws.

Article IX.

That the Subcontractor will pay any and all federal, territorial and municipal taxes, including sales taxes, if any, for which the Subcontractor may be liable in connection with the labor and materials herein, or in carrying out the Subcontract, prior to final payment being made to him.

Article X.

To pay industrial insurance and all other payments required under the Workmen's Compensation laws as the same become due and to furnish Oaks Construction Company with evidence that the same has been paid before final payment is made on this Subcontract.

Article XI.

That all materials delivered by or on account of the Subcontractor and intended to be incorporated into the construction hereunder shall become the property of the Owner as delivered; but the Subcontractor may repossess himself of any surplus remaining at the completion of his contract. That all scaffolding, apparatus, ways, works, machinery and plant brought upon the premises by the Subcontractor shall remain his property, but in case of default and the completion of the work by Oaks

Construction Company, the latter shall be entitled to use the said scaffolding, apparatus, ways, works, machinery and plant without cost, or liability for depreciation or damage by use and without prejudice to Oaks Construction Company's other rights or remedies for any damage or loss sustained by reason of said default.

Article XII.

This contract herein is upon a unit price, it is understood and agreed that any quantities and amounts mentioned are approximate only and may be more or less at the same unit price, and subject to change as ordered and directed by Oaks Construction Company.

Article XIII.

To indemnify and save harmless Oaks Construction Company from and against any and all suits, claims, actions, losses, costs, penalties, and damages, of whatsoever kind or nature, including attorney's fees, arising out of, in connection with, or incident to the Subcontractor's performance of this Subcontract.

Article XIV.

To immediately, after receiving written notice from the Contractor, proceed to remove or take from the grounds or buildings, all materials condemned by Oaks Construction Company, whether worked or not, as unsound or improper, or as in

any way failing to conform to the Oaks-Williams Bros. Contract, including the general or special conditions, drawings, specifications, or addenda. Failure of Oaks Construction Company to immediately condemn any work or materials as installed shall not in any way waive Oaks Construction Company's right to object thereto at any subsequent time.

Article XV.

To commence and at all times carry on, perform and complete this Subcontract to the full and complete satisfaction of Oaks Construction Company, and of the Owner. It is specifically understood and agreed that in the event Oaks Construction Company shall at any time be of the opinion that the Subcontractor is not proceeding with diligence and in such a manner as to satisfactorily complete said work within the required time, then and in that event Oaks Construction Company shall have the right, after reasonable notice of 72 hours, to take over said work and to complete the same at the cost and expense of the Subcontractor, without prejudice to Oaks Construction Company's other rights or remedies for any loss or damage sustained.

Article XVI.

Upon completion of any unit of the work, and upon final completion thereof, to clean up all refuse and rubbish around or alongside the same caused

by the Subcontractor and to promptly remove all excess material, tools, structures, etc.; which may have been brought on the premises or erected by the Subcontractor, and in the event of the failure of the Subcontractor so to do, Oaks Construction Company may so clean up the premises at the cost and expense of the Subcontractor.

Article XVI.

The Subcontractor is required to furnish Payment and Performance Bonds, each in one-half the amount of this subcontract, naming Oaks Construction Company as Principal, and shall pay all costs and premiums on such aforesaid bonds.

The Subcontractor shall carry Public Liability and Property Damage Insurance and all other insurance required by the specifications and by law, naming Oaks Construction Company as beneficiary and hereby assigns all payments from such policies to Oaks Construction Company. The Subcontractor shall furnish Oaks Construction Company with not less than three Certificates of Insurance covering Workmen's Compensation. The Subcontractor may not cancel such insurance without 10 (ten) days notice to Oaks Construction Company and to the Owner and the above-mentioned Certificates of Insurance shall so state.

Article XVIII.

The Subcontractor in performing the work required by this Subcontract, shall not discriminate

against any employee or applicant for employment because of race, creed, color, national origin, or political affiliation in the employment of persons qualified by training and experience.

Article XIX.

The Subcontractor shall comply with all existing Union Agreements applicable to his work or to that of the Contractor and Oaks Construction Company.

Article XX. Unit Price Schedule.*

1.

Appr. Quan.:

Unit: Feet.

Item: Right of Way Clear, windrow compact and/or dispose as detailed in Article XXI para. 1 and 2.

Unit Price: \$0.065.

Approx. Amount: \$31,000.00.

2.

Unit price: Six and one-half cents.

Unit: Hours.

Item: Operated Caterpillar D-8 Tractor w/dozer as detailed in Article XXI para. 4 & 3.

*[This Article is printed as corrected. Initialed C.E.O. and S.E.T.]

Unit price: \$18.00.

Approx. amount: \$900.00.

Unit price: Eighteen dollars.

Article XXI. Special Conditions.

(1) All standing trees, brush, etc., within the fifty-foot right of way are to be felled. Thirty feet of the right of way is to be completely cleared of all debris to ground level. Materials removed from this latter 30-foot width may be windrowed on 15 feet of the remaining right of way and compacted to a height not exceeding one foot or, by mutual agreement with the Oaks Construction Company and subcontractor, these materials may be buried in suitable holes, gullies, lakes, etc., on the right of way. A fire break of 25 feet in length, which is completely clear of all combustibles must extend across the right of way at intervals of 500 feet or less.

(2) Where the pipeline crosses roadways, the right of way for 300 feet on each side of the roadway center line must be completely free of all debris. All debris from this clearing must be buried in suitable holes, etc., or burned.

(3) It is anticipated that Oaks Construction Company may require the use of the Subcontractor's equipment for work not detailed above; for this work Oaks Construction Company will pay the Subcontractor the unit price per operated hour for each Caterpillar D-8 Tractor with dozer, as set

forth, in paragraph 2 of Article XX. The listed unit price for such hourly work includes dozer, operator, fuel, maintenance, and rental of equipment and shall be full and complete compensation for such work. Idle or repair time is not chargeable to Oaks Construction.

(4) It is the intent of Oaks Construction Company to pay the Subcontractor on an hourly basis for disposing of material where such material is moved in excess of 100 feet, except as provided in paragraphs 1 and 2 above. Hourly payment shall be made only for the actual time involved in transporting the material and shall not include any other time, nor costs to Oaks Construction Company.

(5) All work detailed in paragraphs 3 and 4 will be authorized by purchase orders issued and signed by the Contractor's job representative which detail the area and equipment hours used. No payment will be made for work not authorized by a purchase order issued to the Subcontractor.

(6) The location of the work is on the right of way of the Products Pipeline System between Station 1937/38.0 PI near Buffalo Lodge and Station 567/31 PI about Mile 1325.4 Alaska Highway.

(7) Special Conditions applicable to: None.

Article XXII. Method of Measurement.

See 1-22 of the Specifications.

The hours of rented equipment paid the subcontractor shall be the total hours worked which have

been approved on purchase order forms as set forth in Article XXI, Paragraph 5 of this Subcontract.

Article XXIII. Payment.

Payment shall be at the rates as hereinbefore set forth. Ten per cent of all partial payments due the Subcontractor shall be retained by Oaks Construction Company.

Final payment for the work covered by this Subcontract shall be made only after acceptance of the work by the Owner and payment therefore having been received by Oaks Construction Company.

Witness our hands and seals as of the day and seals as of the day and year herein first above written.

OAKS CONSTRUCTION
COMPANY,

By /s/ CARL E. OAKS.

Witnesseth:

STUART CONSTRUCTION
CO., INC.,

By /s/ STUART E. TOPE,
Subcontractor.

Witness:

/s/ KENNETH I. JOHNSON,

/s/ OLIN A. DWYER.

[Endorsed]: Filed February 10, 1955.

[Title of District Court and Cause.]

MOTION TO DISMISS

Come now the defendants, Carl E. Oaks, J. Butcher and J. E. Noonan, d/b/a Oaks Construction Company, through their attorney, John C. Dunn, and move the Court in the manner following:

(a) To dismiss the complaint against these moving defendants with respect to both causes of action therein stated on the ground that the contract on which this complaint is based has been assigned by plaintiffs Stuart Construction Co., Inc., and that neither of the plaintiffs, therefor, is the real party in interest to prosecute this action.

(b) To dismiss the complaint with respect to plaintiff Stuart E. Tope and with respect to both causes of action therein stated on the ground that, as appears from said complaint and the exhibit attached thereto, plaintiff Stuart E. Tope is not a party to the contract on which this action is based.

(c) To dismiss the complaint against these moving defendants with respect to both causes of action therein stated for the reason that no notice was given as required by Section 270 B of Title 40, United States Code Annotated, on which Section this action is based.

(d) To grant these moving defendants judg-

ment against plaintiffs for their costs and disbursements herein, including a reasonable attorney's fee.

/s/ JOHN C. DUNN,

Attorney for Cal E. Oaks, J. Butcher and J. E. Noonan, d/b/a Oaks Construction Co.

Service of copy acknowledged.

[Endorsed]: Filed April 19, 1955.

[Title of District Court and Cause.]

MOTION TO DISMISS

Come now the defendants, Williams Brothers Company, McLaughlin, Inc., and Marwell Construction Company, Ltd., through their attorney, John C. Dunn, and move the Court as follows:

(1) To dismiss the complaint herein filed, as against them, with respect to both causes of action therein stated, on the ground that, as appears from the complaint and the exhibit attached thereto, there is no privity of contract between either of plaintiffs and one or more of these moving defendants.

(2) To dismiss the complaint herein filed with respect to plaintiff Stuart E. Tope, against these moving defendants and with respect to both causes of action set forth in said complaint, on the ground that, as appears from the complaint and the exhibit

attached thereto, plaintiff Stuart E. Tope is not a party to the contract on which this action is based.

(3) To dismiss the complaint, against these moving defendants and with respect to both causes of action therein stated, on the ground that plaintiff Stuart Construction Co., Inc., has assigned the contract on which this action is based and, therefore, neither of plaintiffs is the real party in interest in this action;

(4) To dismiss this complaint against these moving defendants with respect to both causes of action therein stated on the ground that neither of plaintiffs gave the notice required to be given by Section 270B of Title 40, United States Code Annotated, upon which Section this cause of action is based.

(5) To grant these moving defendants judgment against both plaintiffs for their costs and disbursements herein, including a reasonable attorney's fee.

/s/ JOHN C. DUNN,
Attorney for Defendants Williams Brothers Company; McLaughlin, Inc., and Marwell Construction Company, Ltd.

Service of copy acknowledged.

[Endorsed]: Filed April 19, 1955.

[Title of District Court and Cause.]

M. O. RENDERING ORAL DECISION

Now at this time, this cause coming on to be heard before the Honorable J. L. McCarrey, Jr., District Judge, the following proceedings were had, to wit:

Now at this time, arguments having heretofore and on the 17th day of June, 1955, been had in cause No. A-10,656, entitled United States of America, for the use and benefit of Stuart Construction Co., Inc., a corporation, and Stuart E. Tope, an individual, plaintiffs, versus Carl E. Oaks, J. Butcher and J. E. Noonan, d/b/a Oaks Construction Company, Williams Brothers Company, McLaughlin, Inc., and Marwell Construction Company, Ltd., defendants, and the Court having reserved its decision,

Whereupon, Court now renders its oral decision, and now denies motion to dismiss, and defendants given ten (10) days within which to answer.

Entered October 10, 1955.

[Title of District Court and Cause.]

ANSWER AND COUNTERCLAIM

Come now the defendants, through their attorney, John C. Dunn, and answer the complaint of plaintiffs herein in the manner following:

First Cause of Action

I.

Defendants deny that plaintiff Stuart Construction Co., Inc., is a corporation that has complied with all Territorial requirements precedent to bringing this suit.

II.

Defendants deny that Williams Brothers Company, McLaughlin, Inc., and Marwell Construction Company, Ltd., entered into a subcontract with Williams-McLaughlin for a portion of the construction of the pipeline mentioned in paragraph I of plaintiffs' first cause of action.

III.

Defendants admit that on or about December 15, 1953, Oaks Construction Company entered into a subcontract with Williams Brothers Company for work on the pipeline mentioned in paragraph I of plaintiffs' first cause of action.

IV.

Defendants admit that, on or about December 17, 1953, defendant Oaks Construction Company entered into a contract with Plaintiff Stuart Construction Co., Inc., as evidenced by Exhibit "A" attached to the complaint filed herein.

V.

Defendants deny that defendant companies were bonded as provided by Title 40, United States Code, Section 270 a.

VI.

Defendants deny that this cause of action is brought under the provisions of Title 40, United States Code, Section 270 b.

VII.

Defendants lack information sufficient to form a belief as to the truth or falsity of the remainder of the allegations contained in paragraph I of plaintiffs' first cause of action and, therefore, deny the same.

VIII.

Defendants deny each and every allegation contained in Paragraph II of plaintiffs' first cause of action.

And, by way of answer to plaintiffs' second and alternative cause of action, defendants say as follows:

I.

Defendants deny each and every allegation contained in paragraph I in plaintiffs' second and alternative cause of action.

By way of special defense to both causes of action alleged by plaintiffs, defendants allege the following:

I.

That no privity of contract exists with respect to any party hereto other than between plaintiff Stuart Construction Co., Inc., and Oaks Construction Company.

II.

That plaintiffs herein, and neither of them, is the real party in interest herein.

III.

That this action has been begun without proper authority or power with respect to plaintiff Stuart Construction Co., Inc.

IV.

That plaintiffs, and neither of them, have given the notice required by Section 270 b of Title 40 of the United States Code Annotated with respect to a person or legal entity having no contractual relationship, express or implied, with the contractor furnishing the payment bond mentioned in said section 270 b.

Having answered the causes of action set forth in the complaint filed herein, come now the defendants Carl E. Oaks, J. Butcher, and J. E. Noonan, doing business as Oaks Construction Company, and by way of counterclaim against plaintiffs, jointly and severally, allege as follows:

I.

Carl E. Oaks, Owen J. Butcher and J. E. Noonan, were at all times complained of herein, co-partners doing business as Oaks Construction Company.

II.

Plaintiff Stuart Construction Co., Inc., purports to be a corporation organized and existing under

the laws of the Territory of Alaska; however, defendants believe and, therefore, allege that plaintiff Stuart E. Tope and Stuart Construction Co., Inc., are one and the same legal entity.

III.

On or about December 17, 1953, defendants entered into the subcontract which is attached to the complaint filed herein as Exhibit "A."

IV.

Plaintiffs failed to perform the work required by said contract, defaulted thereunder, neglected and refused to furnish bond and insurance and both as called for therein, and violated practically every provision of said contract by plaintiffs to be performed.

V.

Insofar as plaintiffs did perform under said contract of December 17, 1953, the work performed was not according to prescribed standards and specifications, was unworkmanlike, and faulty.

VI.

Plaintiffs completed approximately only one-third of the work called for by said contract of December 17, 1953.

VII.

The value of the work performed by plaintiffs under said contract of December 17, 1953, is not more than \$33,335.47.

VIII.

Defendants have made payroll advances and paid invoices and various bills incurred by plaintiffs under said contract of December 17, 1953, to the extent of \$71,416.29, such being done at the instance and request of plaintiffs.

IX.

There is now due and owing to defendants from plaintiffs under said contract of December 17, 1953, the sum of \$38,080.82, and, although defendants have demanded payment of the same, plaintiffs refuse to pay any part thereof.

X.

In addition to said sum of \$38,080.82, plaintiffs have pledged the credit of defendants and have done acts and permitted acts to be done which have resulted in indebtedness, which, unless paid for by defendants, will result in lienable items and claims against payment and performance bonds which will ultimately have to be paid by defendants, all to the sums of not less than \$6,000.00. Such acts of plaintiffs were wholly unauthorized by defendants, or any of them, and wholly unjustified.

XI.

As a result of plaintiffs' unauthorized and deliberate pledging of the credit of defendants, defendants have been subjected to actions at law which defendants have to defend at their own ex-

pense, all to the damage of the defendants of not less than \$3,000.00.

XII.

By the unauthorized, unjustified and deliberate pledging of defendants' credit, by plaintiffs, plaintiffs have wilfully and maliciously subjected defendants to unnecessary expense and have injured, maligned and jeopardized the credit rating and business reputation of defendants so that defendants are entitled to punitive damages against plaintiffs in the amount of not less than \$25,000.00.

XIII.

As a result of plaintiffs' failure to perform said contract of December 17, 1953, and of plaintiffs' pledging, unauthorizedly, the credit of defendants as aforesaid, damaging defendants' reputation for good credit, and damaging defendants' business reputation, defendants were unable to complete the work defendants had contracted to complete; a part of which was sub-let to plaintiffs under said contract of December 17, 1953, at a profit. The total amount so lost by defendants is now the subject of an audit and is not available to defendants at this time; however, such loss resulted from the wrongful acts of plaintiffs; and defendants are entitled to be reimbursed therefor by plaintiffs at such time as the sum becomes known.

Wherefore, defendants pray that plaintiffs take nothing by virtue of their complaint filed herein and that defendants be allowed their costs and dis-

bursements herein, including a reasonable attorney's fee;

And defendants Carl E. Oaks, Owen J. Butcher and J. E. Noonan further pray for a judgment against plaintiffs, jointly and severally, in the amount of \$72,080.82, plus interest thereon as allowed by law; and for the further sum hereafter computed by audit which constitutes a loss to defendants on the work contracted to be done by them; a part of which was sub-let by them to plaintiffs; for their costs and disbursements herein, including a reasonable attorney's fee; and for such other and further relief as the Court may deem just in the premises.

/s/ JOHN C. DUNN,

Atty. for Defendants.

Duly verified.

Service of copy acknowledged.

[Endorsed]: Filed October 27, 1955.

[Title of District Court and Cause.]

REPLY TO COUNTERCLAIM

Plaintiffs reply to the Counterclaim of the defendants, Carl E. Oaks, J. Butcher and J. E. Noonan and say:

I.

Admit the allegations contained in Paragraph I.

II.

Deny the allegations contained in Paragraph II.

III.

Admit the allegations contained in Paragraph III.

IV.

Deny the allegations contained in Paragraphs IV through XIII.

Wherefore, Plaintiffs pray for judgment as requested in their complaint.

BUELL A. NESBETT,

By /s/ BUELL A. NESBETT,
Attorney for Plaintiffs.

Service of copy acknowledged.

[Endorsed]: Filed December 8, 1956.

[Title of District Court and Cause.]

MEMORANDUM OPINION ON MERITS
OF CASE

Attorney for Plaintiffs:

BUELL A. NESBETT, ESQ.

Attorney for Defendants:

JOHN C. DUNN, ESQ.

This action purports to have been brought under the provisions of Section 270b, Title 40, U.S.C.A. The said section and the preceding one specifically provide for the protection of subcontractors and others in performing duties in connection with United States public works. For instance, it is specifically provided by Section 270a of said Title 40, U.S.C.A., that a contractor, in contracting with the Government in connection with public works, shall provide a bond for the protection of all persons who have had occasion to perform services or to furnish equipment in connection with said public works. Such bond is designated as a performance bond.

By Section 270b, *supra*, it is provided that:

“Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor * * * shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sums or sums justly due him: * * *” (Emphasis mine.)

It is further provided that any person having a direct relationship with the subcontractor and none with the main contractor can only sue after notice to the main contractor.

It is further provided that suits on the performance bond shall be brought in the name of the United States, etc.

In this case the bonding company was not made a party. The suit proceeds against the original contractors and a subcontractor. Since the action does not conform to the statute, it is not an action under said section 270b. Moreover, the original contractors, having had no privity of contract with the plaintiff, should be, and the same are eliminated from this proceeding.

It further appeared from the evidence that the Oaks Construction Company was a partnership composed of Carl E. Oaks, J. Butcher and J. E. Noonan, and that the last two named partners have deceased, and that no suggestion of death has been made so that the action might proceed in the name of personal representatives. Accordingly, the only defendant remaining in the case is Carl E. Oaks. There are two plaintiffs, Stuart Construction Co., Inc., and Stuart E. Tope. And the evidence disclosed that, whereas the Stuart Construction Co., Inc., had a contract with the Oaks Construction Company dated December 17, 1953, yet said corporate plaintiff, upon all the evidence, performed no service and was without equipment to carry out the contract executed as above stated. There was no pretense that the contract with Stuart Construction Company was ever observed or carried out. The corporate entity (like Banquo's ghost in Macbeth) would not down and constantly appeared, not

as a terrifying phantom but as a confusing one. The meaning of this is, that the only parties to this action who deserve comment and invoke decision in the controversy are Stuart E. Tope and Carl E. Oaks, the latter doing business as Oaks Construction Company.

It appeared from the testimony that the personal plaintiff, Stuart E. Tope, incorporated the Stuart Construction Co., Inc., in the year 1952. In a way, he did business in the name of this corporate entity. When the contract of December 17, 1953, was executed, Stuart Construction Co., Inc., had no equipment and was practically without funds. The contract of said date required the performance of conditions precedent before said contract would become effective. Not one of these conditions was observed or carried out. The personal defendant, however, did own equipment, and placed it on the construction job. It should be stated here, that the contract with the Government involved the clearing of a right of way for Pipeline Products System extending 600 miles from Haines to Fairbanks, Alaska. The so-called subcontract with Stuart Construction Co., Inc., covered a segment of approximately 100 miles. Upon this segment the personal plaintiff, with his equipment consisting of three Caterpillars, one 2½ ton Dodge Truck, one Ford Station Wagon, and one G. M. C. ½ ton Pickup Truck, went on the job. The personal plaintiff was paid \$250.00 per week for his services, but nothing was said or arranged about compensation

for the use of his equipment. However, it was used by the defendant, purportedly upon the approximately 100 miles covered by the subcontract with Stuart Construction Co., Inc.

While the defendant used the personal plaintiff's equipment and exercised complete control over it, yet, throughout the construction work, the plaintiff and his equipment were treated as operating under the subcontract of December 17, 1953. The defendant elected to declare a default under said contract and made claims against the Stuart Construction Co., Inc., upon the theory that it had failed to perform the service or to observe the conditions precedent named in the contract. The corporate plaintiff brought suit on one count upon the contract, and the personal plaintiff brought suit in the same action on another count for the equipment used by the defendant on the job.

The evidence disclosed that the personal plaintiff was the owner of all the equipment furnished and used by the defendant. His ownership, however, was based upon a "Rental Agreement With Option to Purchase" from Northern Commercial Company of Fairbanks, Alaska. Because of this arrangement, on December 2, 1953, before execution of the above-named subcontract, Stuart Construction Co., Inc., made an assignment to Northern Commercial Company of:

"* * * all sums of money now due or to become due us from Oaks Construction Co. for

any and all accounts including, but not limited to, earnings to become due under pipeline clearing contract and/or snow clearing.”

This was signed by the Stuart Construction Co., Inc., and accepted by Oaks Construction Co., through Carl E. Oaks.

It is not disputed that the equipment of the personal plaintiff was used by Oaks Construction Company. For instance, the 2½ ton Dodge Truck was used three months and three weeks; the Ford Station Wagon was used three months and three weeks; the GMC Pickup ½ ton was used three months and three weeks, and the three Caterpillars, according to the data furnished by the defendant, were used 723½ hours. The Caterpillars were used in rough terrain, over the protest of the personal plaintiff, and the result was that the machinery was broken and disabled, and, much of the time being out of repair, was not suitable for use.

The evidence was that the naked rental of such machinery would run from \$20.00 to \$35.00 per hour. And the evidence indicated that the reasonable rental on the 2½ ton Dodge Truck would be \$800.00 per month; the Ford Station Wagon, \$250.00 per month, the GMC Pickup Truck, \$250.00 per month.

Pursuant to the assignment to the Northern Commercial Company, the defendant compromised the rentals on the personal plaintiff's equipment due

to the Northern Commercial Company, and paid the sum of \$5,332.50.

It would follow that the personal plaintiff would be entitled to judgment against the defendant for the use of his equipment less the amount paid to the Northern Commercial Company.

1. While the personal plaintiff claimed rental on all of his equipment during the entire period of construction work, yet there was no express contract to pay a rental on said equipment.

The defendant admits that the three Caterpillars were used a total of 723½ hours. Since this equipment suffered rough treatment and severe use by the defendant, the machinery being disabled and requiring repair, the personal plaintiff should be allowed the maximum naked rental of \$35.00 per hour.

The testimony showed that a reasonable rental for the use of said machinery under such circumstances would run as high as \$35.00 per hour. Computing a rental charge at this rate would show a rental of \$25,322.50. From this, deducting the amount paid to Northern Commercial Company of \$5,332.50, would leave a balance of \$19,990.00.

2. The evidence showed that the Dodge Truck, the Station Wagon, and the Pickup Truck would carry a reasonable rental of \$4,870.00, which, added to the rental on the Caterpillars of \$19,990.00,

would aggregate \$24,860.00. And the plaintiff is entitled to judgment for this amount,

Counsel for plaintiff will prepare and submit appropriate Findings of Fact and Declarations of Law, together with a proposed Judgment.

Kansas City, Missouri, October 9, 1958.

/s/ ALBERT L. REEVES,
Visiting Judge.

[Endorsed]: Filed October 13, 1958.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came on regularly for hearing before the Honorable Albert L. Reeves, Federal District Judge, sitting as a visiting judge, on August 11, 1958, the plaintiff, Stuart E. Tope being personally present in court and represented by his attorney, Buell A. Nesbett, and the defendant Carl E. Oaks being personally present and all of the defendants being represented by their attorney, John C. Dunn. Evidence, both oral and documentary, was introduced by both sides and hearing concluded on the 15th day of August, 1958. The matter was taken under advisement by the Court. From the Memorandum Opinion on Merits of Case rendered by the Court on October 9, 1958, the following Findings of Fact and Conclusions of Law are derived.

Findings of Fact

I.

That there was no direct relationship or privity of contract between either of the plaintiffs and the defendant Williams Brothers Company, McLaughlin, Inc., and Marwell Construction Company, Ltd.

II.

That the defendants J. Butcher and J. E. Noonan died after the commencement of this action and their personal representatives have not been joined as parties defendant.

III.

That the contract between Stuart Construction Co., Inc., and Oaks Construction Co. was never observed or carried out, certain conditions precedent were not performed and Stuart Construction Co., Inc., as a corporation performed no services, owned no equipment and in fact did not function as a corporate entity insofar as the issues in this case are concerned.

IV.

That the personal plaintiff, Stuart E. Tope, owned certain equipment consisting of three caterpillar tractors one 2½ ton Dodge truck, one Ford station wagon and one GMC ½-ton pickup truck which he was purchasing from the Northern Commercial Company of Fairbanks under a rental agreement with option to purchase.

V.

That the defendant Oaks Construction Company

exercised complete control over and used the equipment mentioned in paragraph IV in the clearing of approximately 100 miles of a 600-mile right-of-way for the construction of an oil pipeline for the United States Government between Haines and Fairbanks, Alaska.

VI.

That no definite agreement had been reached between the personal plaintiff Stuart E. Tope and Oaks Construction Co. as to compensation to that plaintiff for the use of the equipment.

VII.

That the defendant Oaks Construction Co. used the caterpillar tractors a total 723½ hours; the 2½-ton Dodge truck for 3 months and 3 weeks; the Ford station wagon for 3 months and 3 weeks and the GMC ½ ton pickup truck for 3 months and 3 weeks.

VIII.

That the reasonable hourly rental rate for the caterpillar tractors under the circumstances of their use was \$35.00 per hour; that the reasonable monthly rental rate for the 2½-ton Dodge truck was \$800.00 per month; that the reasonable monthly rental rate for the Ford station wagon was \$250.00 per month and that the reasonable monthly rental rate for the GMC ½ ton pickup truck was \$250.00 per month.

IX.

That the Northern Commercial Company of Fairbanks, Alaska, attempted to compromise with Carl

E. Oaks d/b/a Oaks Construction Co. the amount of equipment rental due the personal plaintiff Stuart E. Tope from that defendant and actually paid to Northern Commercial Company the sum of \$5,332.50 which payment accrued to the personal plaintiff Stuart E. Tope's benefit and should therefore be deducted from any recovery awarded that plaintiff.

Conclusions of Law

From the foregoing Findings of Fact the Court makes the following Conclusions of Law:

1. That the defendants J. Butcher, J. E. Noonan and Williams Brothers Company, McLaughlin, Inc., and Marwell Construction Company, Ltd., are eliminated as defendants in this action.

2. That the written contract between Stuart Construction Co., Inc., and Oaks Construction Co. is a legal nullity.

3. That Stuart Construction Co., Inc., as a corporate entity is not properly a party to this case.

4. That the personal plaintiff Stuart E. Tope and the defendant Carl E. Oaks, d/b/a Oaks Construction Co. are the only proper parties.

5. That the personal plaintiff Stuart E. Tope should recover judgment against Carl E. Oaks d/b/a Oaks Construction Company in the sum of \$4,870.00, the reasonable rental value of the 2½ ton Dodge truck, Ford station wagon and GMC ½ ton pickup truck, and in the sum of \$25,322.50 as the reason-

able rental value of the caterpillar tractors; that from the total of the above sums should be deducted the sum of \$5,332.50 paid by Oaks Construction Co. to Northern Commercial Company of Fairbanks, Alaska, which said payment accrued to the benefit of the personal plaintiff Stuart E. Tope.

6. That the personal plaintiff Stuart E. Tope is entitled to interest on the judgment at the rate 6% per annum from August 15, 1954.

7. That the defendant Carl E. Oaks d/b/a Oaks Construction Co. shall recover nothing on the counterclaim.

8. That the plaintiff Stuart E. Tope is entitled to his costs and disbursements as taxed by the Clerk of the Court plus an attorney's fee computed on the basis of Rule 25, Amended Uniform Rules of the District Court for the District of Alaska for a contested case.

Dated at Kansas City, Missouri, 23rd day of October, 1958.

/s/ ALBERT L. REEVES,
Visiting District Judge.

Service of copy acknowledged.

[Endorsed]: Filed November 7, 1958.

In the District Court for the District of Alaska,
Third Division

A-10,656

UNITED STATES OF AMERICA, for the Use
and Benefit of Stuart Construction Co., Inc., a
Corporation, and STUART E. TOPE, an In-
dividual,

Plaintiffs,

vs.

CARL E. OAKS, J. BUTCHER and J. E.
NOONAN, d/b/a OAKS CONSTRUCTION
COMPANY, WILLIAMS BROTHERS COM-
PANY, McLAUGHLIN, INC., and MAR-
WELL CONSTRUCTION COMPANY, LTD.,

Defendants.

JUDGMENT

Trial of this case in Anchorage, Alaska, before the Honorable Albert L. Reeves, Federal District Judge, commenced on August 11, 1958, and was completed on August 15, 1958. The plaintiff Stuart E. Tope was personally present in court and represented by his attorney, Buell A. Nesbett, and the defendant Carl E. Oaks was personally present in court and all of the defendants were represented at the trial by their attorney, John C. Dunn. Evidence both oral and documentary was introduced by both sides and the Court rendered its Memorandum Opinion on Merits of Case on October 9, 1958. Find-

ings of Fact and Conclusions of Law having been duly entered,

It is hereby adjudged and decreed:

1. That the action be dismissed as to the plaintiff, Stuart Construction Company, Inc., and as to the defendants J. Butcher, J. E. Noonan and Williams Brothers Company, McLaughlin, Inc., and Marwell Construction Company, Ltd.

2. That the counterclaim of the defendants be dismissed.

3. That the plaintiff Stuart E. Tope, individually have judgment against the defendant Carl E. Oaks d/b/a Oaks Construction Company in the sum of \$24,860.00 plus interest from the 15th day of August, 1954, at the rate of 6% per annum.

4. That the plaintiff Stuart E. Tope have his costs and disbursements as taxed by the Clerk of this Court and an attorney's fee computed on the basis of Rule 25, Amended Uniform Rules of the District Court for the District of Alaska, for a non-lien contested case.

Dated at Kansas City, Missouri, this 23rd day of October, 1958.

/s/ ALBERT L. REEVES,
Visiting Judge.

Service of copy acknowledged.

[Endorsed]: Filed and entered November 7, 1958.

[Title of District Court and Cause.]

MOTION TO AMEND FINDINGS, MAKE
ADDITIONAL FINDINGS, AND AMEND
JUDGMENT ACCORDINGLY.

Come now the defendants and move the Court to amend its Findings of Fact and Conclusions of Law heretofore made herein, make additional Findings of Fact and Conclusions of Law, and amend the Judgment heretofore entered herein accordingly.

This motion is in two parts. The first part deals with findings in the event this Court determines ultimate liability as currently set forth in the judgment dated October 23, 1958, and heretofore entered herein on November 7, 1958.

The second part is concerned with findings in the event this Court determines ultimate liability of a nature other than that set forth in the judgment of November 7, 1958.

Part One

In the event this Court ultimately determines liability to be of the nature of that set forth in the judgment heretofore entered on November 7, 1958, defendants move this Court to amend the judgment of November 7, 1958, so as to conform to amended and additional findings and conclusions, which are hereby requested, of the nature following:

Findings of Fact

I.

Williams Bros. Co., McLaughlin, Inc., and Marwell Construction Co., Ltd., are corporations which

formed a joint venture known as Williams, McLaughlin and Marwell, which joint venture obtained a contract from the government of the United States of America to construct approximately six hundred miles of pipeline between Haines, Alaska, and Fairbanks, Alaska.

II.

Oaks Construction Co. was a partnership consisting of Carl E. Oaks, J. Butcher, and J. E. Noonan; however, during the pendency of this action, J. Butcher and J. E. Noonan died. The personal representatives of neither of the deceased partners were ever substituted as parties defendant herein.

III.

Oaks Construction Co. obtained a subcontract from Williams, McLaughlin and Marwell to clear and grade the six hundred miles of pipeline right of way.

IV.

This action is concerned with the work of clearing the right of way on approximately a one hundred mile section of said pipeline lying between Big Delta, Alaska, and Tok Junction, Alaska.

V.

Under date of December 17, 1953, Oaks Construction Co., over the signature of Carl E. Oaks, entered into a subcontract with Stuart Construction Co., Inc., over the signature of Stuart E. Tope by the terms of which Stuart Construction Co., Inc., was to furnish all materials, supplies and equipment and perform all labor required to clear said one hundred

miles of right of way in accordance with provisions of the prime contract and the plans and specifications governing the same. Said work was to be completed with 120 calendar days and was to be paid for at the rate of 6½¢ per lineal foot. Said subcontract also provided a rental of \$18.00 an hour for D-8 caterpillar tractors, manned and operated, for work required beyond the scope of said subcontract. The subcontract of December 17, 1953, required Stuart Construction Co., Inc., to furnish a payment and performance bond.

VI.

This cause of action proceeded on two counts. The first count sought recovery by Stuart Construction Co., Inc., on the subcontract of December 17, 1953, against all defendants and purported to be brought under the Miller Act (Title 40, USCA, Sec. 270-A). The second and alternative count was brought in the name of Stuart E. Tope and sought recovery against Oaks Construction Co. on the basis of equipment furnished and services rendered in connection with clearing right of way.

VII.

Both counts of the complaint sought recovery of the same amount of money and were based upon rental of a 2½ ton Dodge truck at the rate of \$800.00 a month for three months and three weeks, a Ford station wagon at \$250.00 a month for three months and three weeks, a ½ ton GMC pickup truck at \$250.00 a month for three months and three

weeks, and caterpillar tractor time at the rate of \$25.00 an hour, all for a total of \$53,620.00.

VIII.

Both plaintiffs agreed that an off-set against caterpillar rental for operating costs should be allowed in the amount of \$16,698.00.

IX.

Neither plaintiff gave any notice of this claim to the prime contractor, Williams, McLaughlin and Marwell.

X.

This action was not brought in the name of the United States of America.

XI.

The company bonding of the prime contractor, Williams, McLaughlin and Marwell, was not made a party to this action.

XII.

Under date of December 2, 1953, an assignment running to the Northern Commercial Co. of Fairbanks, Alaska, and accepted by Oaks Construction Co. was executed by Stuart Construction Co., Inc., over the signature of Stuart E. Tope as president. Said instrument read in part, "We hereby assign * * * all sums of money now due or to become due to us from Oaks Construction Co. for any and all accounts including, but not limited to, earnings to become due under pipeline clearing contract and/or snow clearing."

XIII.

Stuart E. Tope incorporated Stuart Construction Co., Inc., in 1952. The sole stockholders of Stuart Construction Co., Inc., and the only ones there have ever been, are Stuart E. Tope, his wife and his brother-in-law. The personal activities of Stuart E. Tope were confusingly intermingled with the corporate activities of Stuart Construction Co., Inc. Stuart E. Tope conducted his personal business in the name of Stuart Construction Co., Inc.

XIV.

Throughout the work called for by the subcontract of December 17, 1953, Stuart Construction Co., Inc., owned no equipment, performed no service, and was practically without funds.

XV.

From sometime in December of 1953 until sometime in April of 1954, Stuart E. Tope was paid a salary for services rendered in connection with the work covered by said subcontract of December 17, 1953, at \$250.00 a week.

XVI.

Stuart E. Tope had possession of caterpillar tractors, a Dodge truck, a Ford station wagon, and a GMC pickup truck which were used in the course of performing the work called for by said subcontract of December 17, 1953. The two trucks and the station wagon were used for a period of three months and three weeks, each, and the caterpillar tractors were used 723½ hours.

XVII.

These caterpillar tractors, trucks and station wagon were owned by the Northern Commercial Co. of Fairbanks and possessed by Stuart E. Tope under rental agreements with option to purchase. Stuart E. Tope never exercised the option to purchase, and all this equipment was subsequently repossessed by the Northern Commercial Co.

XVIII.

No bond was ever furnished as called for by said subcontract of December 17, 1953, but Stuart E. Tope attempted to get such a bond both before and after the execution of said subcontract of December 17, 1953.

XIX.

Between December 1 and December 15, 1953, defendant Carl E. Oaks told Stuart E. Tope to forget about obtaining a bond and that they would work something out on an hourly basis of rental for equipment used by Oaks Construction Co.

XX.

Under date of February 6, 1954, Stuart Construction Co., Inc., made a request for a progress payment on a footage basis for the period ending January 29, 1954. This request was over the signature of Stuart E. Tope.

XXI.

Throughout the work called for by said subcontract of December 17, 1953, Oaks Construction Co. proceeded under the theory that the work was being done under said subcontract, furnished Stuart Con-

struction Co., Inc., by delivery to Stuart E. Tope, a weekly payroll report showing monies paid employees performing the work called for by said subcontract of December 17, 1953, and charged against the earnings under said subcontract, and furnished Stuart Construction Co., Inc., by delivery to Stuart E. Tope, a monthly statement of all charges made against the earnings under said subcontract of December 17, 1953. No objection was ever made to any of said charges; however, Oaks Construction Co. exercised complete control over the caterpillars, trucks, and Ford station wagon possessed by Stuart E. Tope and, generally, exercised complete control over and conducted the work called for by said subcontract of December 17, 1953. The business records kept by Stuart Construction Co., Inc., were incomplete and irregular.

XXII.

The complaint herein was filed February 10, 1955; however, annual corporation taxes due the Territory of Alaska from plaintiff corporation on January 1, 1958, were not paid until May 23, 1958. The annual report of Stuart Construction Co., Inc., for the year ending September 30, 1955, and due December 1, 1955, was not filed until December 10, 1956; and annual reports for the years ending September 30, 1956, and September 30, 1957, and due December 1, 1956, and December 1, 1957, were not filed until August 13, 1958.

XXIII.

On August 15, 1954, Carl E. Oaks refused to meet

Stuart E. Tope in the offices of the Northern Commercial Co. in Fairbanks.

XXIV.

On October 4, 1954, in order to prevent the Northern Commercial Co. of Fairbanks from again tying up the funds due Oaks Construction Co., as the N. C. Co. had previously done, from Williams, McLaughlin and Marwell, as a result of monies owed N. C. Co. for the caterpillars, trucks and station wagon in the possession of Stuart E. Tope and used in the course of the work called for by said subcontract of December 17, 1953, Oaks Construction Co. made a settlement with N. C. Co. whereby Oaks Construction Co. agreed to pay the N. C. Co. the total sum of \$10,798.47 to apply against the account of N. C. Co. carried against Stuart E. Tope. This settlement was made up of two items. One item was the sum of \$5,332.50 which was one-half the rental due N. C. Co. for the three caterpillar tractors and the Dodge truck possessed by Stuart E. Tope under rental-purchase agreement. The remaining sum of \$5,465.97 was the full open account, being monies due for parts purchased for the above-described equipment, due N. C. Co. as of June 15, 1953, on the account carried in the name of Stuart E. Tope.

XXV.

Oaks Construction Co. paid the Northern Commercial Co. the \$5,332.50.

XXVI.

Subsequently, Oaks Construction Co., Inc., paid the balance of this settlement figure of \$5,465.97.

XXVII.

As a result of this settlement, monies due N. C. Co. under this account were reduced \$10,798.47.

XXVIII.

The evidence concerning a fair rental value for the caterpillar tractors varied from \$18.00 an hour, operated, manned and maintained, to \$35.00 an hour with the lessee bearing the cost of maintenance and furnishing an operator. Likewise, testimony concerning a reasonable rental of the Dodge truck varied from \$300.00 to \$800.00 a month, for the station wagon from \$150.00 to \$250.00 a month, and for the GMC pickup truck from \$130.00 to \$250.00 a month.

XXIX.

The equipment possessed by Stuart E. Tope under the rental-purchase agreement with Northern Commercial Co. was all used equipment in condition good enough for summer operation but not able to withstand the extreme cold temperatures of a winter operation in the area of the work called for by the subcontract of December 17, 1953.

XXX.

Oaks Construction Co. proceeded under the theory that said subcontract of December 17, 1953, was operative, kept records of the cost of completing the work called for by said subcontract, declared said subcontract in default, and cross-claimed against plaintiffs for \$37,498.64, being the difference between the actual cost of completing the work called for by said subcontract, namely, the sum of

\$70,834.11, and that which would have been earned under said subcontract according to its payments schedule, namely, the sum of \$33,335.47.

XXXI.

In connection with the work called for by said subcontract of December 17, 1953, Stuart E. Tope, in the name of Stuart Construction Co., Inc., incurred indebtednesses and pledged the credit of Oaks Construction Co. for which sums Oaks Construction Co. is responsible under the bond it gave Williams, McLaughlin and Marwell, in the total amount of \$5,247.01, for which sum Oaks Construction Co. sought recovery against plaintiffs by way of counterclaim.

XXXII.

Also as a result of the pledging of the credit of Oaks Construction Co. by Stuart E. Tope and in the name of Stuart Construction Co., Inc., Oaks Construction Co. is currently defending two actions at law in Fairbanks, Alaska, for the expenses and damages of which Oaks Construction Co. counterclaimed against plaintiff in the amount of \$3,000.00.

XXXIII.

Oaks Construction Co. also sought punitive damages against plaintiffs by way of counterclaim for their unauthorized pledging the credit and damaging the credit rating and business reputation of Oaks Construction Co.

XXXIV.

Oaks Construction Co. also counterclaimed against

plaintiffs for damages resulting from Oaks Construction Co., as a result of the activities of plaintiffs, being unable to complete the work Oaks Construction Co. contracted to do on said pipeline under subcontract with Williams, McLaughlin and Marwell. However, this work has never been subjected to final audit by Oaks Construction Co.; and Oaks Construction Co. abandoned this part of its counterclaim.

Conclusions of Law

Based on the foregoing findings of fact, the Court makes the following conclusions of law:

I.

The statutory requirements of basing an action under the Miller Act (Title 40, USCA, Sec. 270) were not met, and no recovery can be had under the provisions of said act.

II.

No privity of contract exists between either plaintiff and one or more of the following, namely: Williams Bros. Co., McLaughlin, Inc., and Marwell Construction Co., Ltd.

III.

The subcontract of December 17, 1953, was void ab initio.

or

The furnishing of a bond, the acquiring of equipment and operating capital by Stuart Construction Co., Inc., were conditions precedent to the sub-

contract of December 17, 1953, becoming effective; and said subcontract remained a nullity, because these conditions were not fulfilled.

or

There was a binding oral agreement between Stuart E. Tope and Oaks Construction Co. to waive the requirement of a bond, rescind the subcontract of December 17, 1953, and pay Stuart E. Tope for caterpillar tractors, trucks and station wagon on a rental basis.

IV.

Stuart Construction Co., Inc., and Stuart E. Tope are separate and distinct legal entities.

V.

The sole parties in interest herein are Stuart E. Tope and Carl E. Oaks.

VI.

Stuart Construction Co., Inc., is entitled to no recovery herein.

VII.

No one or more of the defendants named herein is entitled to recovery against Stuart Construction Co., Inc., for costs or attorney's fees on the first count of the complaint.

VIII.

Stuart E. Tope is entitled to recover a reasonable value for the use of his equipment on the basis of quantum meruit from Carl E. Oaks.

IX.

The death of two of the partners of Oaks Construction Co. during the pendency of this action does not affect the right of Stuart E. Tope to recover judgment against Carl E. Oaks.

X.

A reasonable rental rate and the amount for which Stuart E. Tope is entitled are as follows:

A.	Caterpillar tractors for 723½ hours at the rate of \$18.00 per hour, totalling	\$13,023.00
B.	Dodge truck for three months and three weeks at the rate of \$300.00, totalling	975.00
C.	Ford station wagon for three months and three weeks at the rate of \$150.00, totalling	487.50
D.	GMC pickup truck for three months and three weeks at the rate of \$130.00, totalling	422.50
Total		<hr/> \$14,908.00

XI.

There should be allowed an off-set against this sum in the amount of \$10,798.47 for monies paid the Northern Commercial Co. of Fairbanks under the settlement concerned with Stuart E. Tope, leaving a net of \$4,109.53, in which amount Stuart E. Tope is entitled to judgment against Carl E. Oaks.

or

There should be allowed an off-set against this sum in the amount of \$5,332.50 for monies paid the Northern Commercial Co. of Fairbanks under the settlement concerned with Stuart E. Tope, leaving a net of \$9,575.50, in which amount Stuart E. Tope is entitled to judgment against Carl E. Oaks. No off-set should be allowed for the sum of \$5,465.97 paid the Northern Commercial Co. of Fairbanks under the same settlement.

XII.

Stuart E. Tope had authority to pledge the credit of and incur indebtedness on behalf of Oaks Construction Co.

XIII.

There should be no recovery on the counterclaim filed herein.

XIV.

Stuart E. Tope is also entitled to judgment against Carl E. Oaks for his costs and disbursements herein as taxed by the Clerk of the above entitled Court, plus a reasonable attorney's fee of \$.....

or

Stuart E. Tope is also entitled to judgment against Carl E. Oaks for his costs and disbursements as taxed by the Clerk of the above-entitled Court, plus an attorney's fee computed in accordance with Rule 25 of the Amended Uniform Rules for the District Courts for the District of Alaska,

based on the sum of \$. for a non-lien, contested case.

XV.

Stuart E. Tope is entitled to interest on said judgment from the date of the same.

or

Stuart E. Tope is entitled to interest on said sum of \$4,109.53 at the rate of 6% per annum from August 15, 1954.

or

Stuart E. Tope is entitled to interest on said sum of \$9,575.50 at the rate of 6% per annum from August 15, 1954.

Part Two

Defendants hereby move the Court to amend the judgment dated October 23, 1958, and heretofore entered herein on November 7, 1958, so as to conform to amended and additional findings and conclusions, which are hereby requested, that are in accord with the preponderance of the evidence admitted, of the following nature:

Findings of Fact

I.

Defendants request the findings numbered I to XII, inclusive, heretofore set forth.

II.

Stuart E. Tope incorporated Stuart Construction Co., Inc., in 1952. The only stockholders there have

ever been of said corporation are Stuart E. Tope, his wife and his brother-in-law. Corporate records kept were fragmentary, kept spasmodically and are most irregular. Stuart E. Tope used the corporate bank account as his personal account and advanced monies to and took monies from the corporation at his will. Stuart E. Tope obtained equipment and made contracts in his own name or that of the corporation as he saw fit. Insofar as there was corporate action, it was taken at the instigation of Stuart E. Tope alone. The affairs of Stuart E. Tope and the affairs of the corporation were so intermingled that it is impossible to distinguish between the two, and the acts of one cannot be distinguished from the acts of the other.

III.

The complaint filed herein is so worded as to seek recovery by either plaintiff but limit liability on a counterclaim to the plaintiff corporation alone.

IV.

At the request of Stuart E. Tope, he received weekly advances of monies earned under said subcontract of December 17, 1953, of \$250.00.

V.

Plaintiffs were without funds necessary to meet the payroll of the employees performing the work called for by said subcontract of December 17, 1953; and the same were, at the request of Stuart E. Tope, advanced by Oaks Construction Co. and charged against the same earnings.

VI.

Plaintiffs progressed slowly with the work called for by said subcontract of December 17, 1953; and, to complete said work according to the plans and specifications of said contract of December 17, 1953, and to prevent delay and penalty in connection with the work contracted to be performed by Oaks Construction Co. from Williams, McLaughlin and Marwell, other equipment was put to work, with plaintiffs' knowledge and tacit consent; and appropriate charges made against earnings.

VII.

The equipment used by plaintiffs was old and continually needed repair, and Stuart E. Tope was absent from the job site a large amount of time while seeking necessary repair parts. This absence necessitated supervision of the work by the personnel of Oaks Construction Co. Stuart E. Tope had no previous experience in clearing right of way at all, or in sub-zero temperatures.

VIII.

Stuart E. Tope had possession of three caterpillar tractors, a Dodge truck, a Ford station wagon and a GMC pickup truck which were used in the course of performing the work called for by said subcontract of December 17, 1953. All of this equipment was used equipment owned by Northern Commercial Co. of Fairbanks but possessed by Stuart E. Tope under rental agreements with option to purchase. The equipment was in condition satisfactory for

summer operation but was not able to withstand the stress of the work called for by the subcontract of December 17, 1953, in sub-zero, winter operation.

IX.

No bond was ever furnished as called for by said subcontract of December 17, 1953, but Stuart E. Tope attempted to get such a bond both before and after the execution of said subcontract of December 17, 1953.

X.

Weekly payroll reports and monthly progress reports were furnished Stuart E. Tope showing the charges made by Oaks Construction Co. against the earnings under said subcontract of December 17, 1953, and no objection was ever made to such charges.

XI.

Under date of February 6, 1954, Stuart Construction Co., Inc., made a request for a progress payment on a footage basis for the period ending January 29, 1954. This request was over the signature of Stuart E. Tope.

XII.

The complaint herein was filed February 10, 1955; however, annual corporation taxes due the Territory of Alaska from plaintiff corporation on January 1, 1958, were not paid until May 23, 1958. The annual report of Stuart Construction Co., Inc., for the year ending September 30, 1955, and due December 1, 1955, was not filed until December 10, 1956; and

annual reports for the years ending September 30, 1956, and September 30, 1957, and due December 1, 1956, and December 1, 1957, were not filed until August 13, 1958.

XIII.

Plaintiffs were in violation of one or more of the terms of said subcontract of December 17, 1953, from the beginning; and, finally, Oaks Construction Co. was forced to and did give formal notice as required by the terms of said subcontract and take over the work called for and complete it at the expense of plaintiffs.

XIV.

On October 4, 1954, in order to prevent the Northern Commercial Co. of Fairbanks from again tying up the funds due Oaks Construction Co., as the N. C. Co. had previously done, from Williams, McLaughlin & Marwell as a result of monies owed the N. C. Co. for the caterpillars, trucks and station wagon in the possession of Stuart E. Tope and used in the course of the work called for by said subcontract of December 17, 1953, Oaks Construction Co. made a settlement with the Northern Commercial Co. whereby Oaks Construction Co. agreed to pay Northern Commercial Co. the total sum of \$10,798.47 to apply against the account of Northern Commercial Co. carried in the name of Stuart E. Tope. Said amount was paid, and the account carried in the name of Stuart E. Tope credited accordingly by the Northern Commercial Co., and the payment charged against earnings under said subcontract of December 17, 1953.

XV.

Total monies earned under said subcontract of December 17, 1953, according to its terms, were \$33,335.47; but the monies actually paid by Oaks Construction Co. to perform the work called for by said subcontract are \$70,834.11, a difference of \$37,498.64.

XVI.

In connection with work called for by said subcontract of December 17, 1953, Stuart E. Tope, in the name of Stuart Construction Co., Inc., incurred indebtedness and pledged the credit of Oaks Construction Co. for which sums Oaks Construction Co. is responsible under the bond it gave Williams, McLaughlin and Marwell, in the total amount of \$5,247.01, for which sum Oaks Construction Co. sought recovery against plaintiffs by way of counterclaim.

XVII.

Also as a result of the pledging of the credit of Oaks Construction Co. by Stuart E. Tope and in the name of Stuart Construction Co., Inc., Oaks Construction Co. is currently defending two actions at law in Fairbanks, Alaska, for the expenses and damages of which Oaks Construction Co. counterclaimed against plaintiff in the amount of \$3,000.00.

XVIII.

Plaintiffs, without authority or justification, willfully pledged the credit of Oaks Construction Co. and subjected Oaks Construction Co. to unnecessary expense and have seriously injured and jeopardized the credit rating and business reputation of Oaks

Construction Co., for which Oaks Construction Co., by way of counterclaim, seeks punitive damages against plaintiffs.

XIX.

Oaks Construction Co. also counterclaimed against plaintiffs for damages resulting from Oaks Construction Co., as a result of the activities of plaintiffs, being unable to complete the work Oaks Construction Co. contracted to do on said pipeline under subcontract with Williams, McLaughlin and Marwell. However, this work has never been subjected to final audit by Oaks Construction Co.; and Oaks Construction Co. abandoned this part of its counterclaim.

Conclusions of Law

Based on the foregoing findings of fact, the Court makes the following conclusions of law:

I.

The statutory requirements of basing an action under the Miller Act (Title 40, USCA, Sec. 270) were not met, and no recovery can be had under the provisions of said act.

II.

No privity of contract ever existed between either plaintiff and one or more of the following, namely: Williams Bros. Co., McLaughlin, Inc., and Marwell Construction Co., Ltd.

III.

The alter ego principle is applicable to this case, and Stuart E. Tope and Stuart Construction Co., Inc., are one and the same legal entity.

IV.

By virtue of having failed to pay and file and to allege and prove such payment and filing of corporate taxes and annual reports required by the laws of the Territory of Alaska, Stuart Construction Co., Inc., is not permitted to begin or maintain this action.

V.

Williams, McLaughlin and Marwell, the joint venture, is entitled to judgment against plaintiffs, jointly and severally, on the First Count of the complaint for their costs and disbursements as taxed by the Clerk of the above-entitled Court, plus a reasonable attorney's fee as computed by Rule 25, Amended Uniform Rules for the District Courts of the District of Alaska, for a contested, non-lien case, in the amount of \$53,620.00.

VI.

Oaks Construction Co. is entitled to judgment against plaintiffs, jointly and severally, on the First Count of the complaint for its costs and disbursements as taxed by the Clerk of the above-entitled Court, plus a reasonable attorney's fee as computed by Rule 25, Amended Uniform Rules for the District Courts of the District of Alaska, for a contested, non-lien case, in the amount of \$53,620.00.

VII.

Having assigned all earnings under the work called for by said subcontract of December 17, 1953, neither plaintiff is a real party in interest herein.

VIII.

Plaintiffs failed to complete the work called for by said subcontract of December 17, 1953, defaulted thereunder, and Oaks Construction Co. is entitled to judgment against plaintiffs, jointly and severally, in the amount of \$37,498.64.

IX.

Plaintiffs had no right or authority to pledge the credit of, or incur indebtedness on behalf of Oaks Construction Co., and Oaks Construction Co. is entitled to judgment against plaintiffs, jointly and severally, in the amount of \$5,247.01 for monies paid by Oaks Construction Co. as a result of such unauthorized pledging and incurring of indebtedness.

X.

Oaks Construction Co. is entitled to judgment against plaintiffs, jointly and severally, in the amount of \$3,000.00 for damages and expenses in defending actions at law in Fairbanks, Alaska, based on the unauthorized pledging by plaintiffs of the credit of Oaks Construction Co.

XI.

Oaks Construction Co. is entitled to judgment against plaintiffs, jointly and severally, in the amount of \$25,000.00 as punitive damages for the wilful and malicious damage by plaintiffs of the credit rating and business reputation of Oaks Construction Co.

XII.

Oaks Construction Co. is entitled to judgment

against plaintiffs, jointly and severally, for its costs and disbursements herein, including an attorney's fee computed, with respect to its counterclaim, on the basis of Rule 25, Amended Uniform Rules for the District Courts of the District of Alaska, for a contested, non-lien case in the amount of \$70,745.65.

XIII.

Stuart E. Tope is entitled to recover nothing by virtue of the Second Count of the complaint filed herein.

This motion is based on Rule 52(b) of the Federal Rules of Civil Procedure and on the Memorandum filed concurrently herewith.

/s/ JOHN C. DUNN,
Attorney for Defendants.

[Endorsed]: Filed November 17, 1958.

[Title of District Court and Cause.]

SUPPLEMENTAL MEMORANDUM

Since the filing of the original memorandum opinion, followed by findings of fact, and conclusions of law, with judgment in favor of the plaintiff, Stuart E. Tope, able counsel for the defendant has seriously challenged some (not all) of the findings, as well as the conclusions of law.

As indicated in the memorandum, the issues were made confusing by sundry cross currents and conflicting theories. Initially, the suit was filed under

the provisions of Section 170b, Title 40, U. S. C. A. For obvious reasons, that theory did not work out. This was explained in the original memorandum opinion.

As an alternative, the plaintiff, Stuart E. Tope, sought recovery on the theory of quantum meruit, and decision was rendered upon that theory. However, even upon that theory, the evidence was varied. It was the contention of counsel for the personal plaintiff that the defendant had used plaintiff's equipment over a considerable period of time, and that he was entitled, as a matter of law, to claim compensation or a fair return for its use. The theory of the personal plaintiff was that the equipment was used under circumstances that would entitle him to \$18.00 per hour for each of three caterpillars, and that, upon that theory, he would be obliged to pay for repairs and upkeep. Upon that particular theory, the evidence indicates that the plaintiff should concede or allow a deduction of approximately \$17,000.00 to defray the cost of operation.

It was the expressed thought that there was a sort of a contractual arrangement between the Defendant Oaks and the personal plaintiff. However, a re-examination of the pleadings and the evidence does not disclose any kind of contractual arrangement. Moreover, upon that theory, it was the contention of the plaintiff (and, in that, he was supported by evidence) that the defendant had the use of plaintiff's equipment over a much longer period of time than that acknowledged by the defendant.

Computation upon the personal plaintiff's theory would have entitled him to a considerably larger judgment than rendered by the court.

With so many cross currents and conflicting theories, it seemed fair and proper, in the light of the testimony, to allow the personal plaintiff a return for the use of his equipment for the exact time acknowledged by the defendant that the equipment had been used. And, upon the evidence, a naked rental of \$35.00 per hour seemed proper. This theory was a concession to the defendant. For, as indicated, a computation based upon the personal plaintiff's proof as to the time the equipment was in the custody of the defendant would have entitled him to a very considerable sum at the rate of \$18.00 per hour, less, of course, the cost of upkeep.

All of the testimony justified the theory upon which the case was decided.

Able and industrious counsel for the defendant challenges the court to say why \$35.00 per hour was allowed whereas the personal plaintiff, on behalf of the corporate plaintiff, kept books upon the theory of \$25.00 per hour. As heretofore indicated, that theory accounted for the use of the equipment over a much longer period of time. Computed upon that theory, as heretofore stated, the personal plaintiff would have been entitled to a much larger judgment.

Again, counsel for the defendant inquires why the defendant was only allowed a credit of \$5,332.50 on the claim of Northern Commercial Company whereas the defendant paid approximately \$10,-

000.00. The testimony disclosed that this was a compromise of one-half the rental which was due the Northern Commercial Company from the personal plaintiff; the balance related to spare parts, which, clearly, under the theory of the decision, became an obligation of the defendant.

It follows from the above that the defendant's motion should be denied, and that the findings of fact, and conclusions of law, as heretofore filed, should remain unaltered, and the judgment should stand as heretofore rendered, and it will be so ordered.

Dated December 11, 1958.

/s/ ALBERT L. REEVES,
Visiting Judge.

[Endorsed]: Filed December 15, 1958.

[Title of District Court and Cause.]

ORDER

As per supplemental memorandum this day filed, it is hereby ordered that the defendant's motion for a stay order, for a modification of the judgment, findings of fact, and conclusions of law, heretofore entered, should be and the same hereby is denied.

Dated December 11, 1958.

/s/ ALBERT L. REEVES,
Visiting Judge.

[Endorsed]: Filed and entered December 15, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: The Clerk of the District Court, Third Division,
District of Alaska:

Sir:

Notice is hereby given that the defendants Carl E. Oaks, Williams Brothers Company, McLaughlin, Inc., and Marwell Construction Company, Ltd., hereby appeal to the Ninth Circuit from the judgment and the whole thereof, except insofar as the same is a judgment of dismissal as to defendants J. Butcher and J. E. Noonan, of the District Court for the Third Division, District of Alaska, entered in the above-entitled cause, dated October 23, 1958, and docketed November 7, 1958, and for which the time for taking an appeal was stayed by virtue of appropriate order denying the motion for modification of judgment and the findings of fact and conclusion of law and for additional findings of fact and conclusions of law, which order was dated December 11, 1958, and docketed December 15, 1958.

/s/ JOHN C. DUNN,

Attorney for Defendants.

[Endorsed]: Filed January 12, 1959.

In the District Court for the District of
Alaska, Third Division

No. A-10,656

UNITED STATES OF AMERICA, for the Use
and Benefit of STUART CONSTRUCTION
CO., INC., a Corporation, and STUART E.
TOPE, an Individual,

Plaintiffs,

vs.

CARL E. OAKS, J. BUTCHER and J. E.
NOONAN, d/b/a Oaks Construction Com-
pany, WILLIAMS BROTHERS COMPANY,
McLAUGHLIN, INC., and MARWELL CON-
STRUCTION COMPANY, LTD.,

Defendants.

Before: The Honorable Albert L. Reeves,
U. S. District Judge.

TRANSCRIPT OF PROCEEDINGS ON TRIAL

Anchorage, Alaska

August 11, 1958—10:00 o'Clock A.M.

Appearances:

BUELL A. NESBETT,
Attorney at Law,
For the Plaintiffs.

JOHN C. DUNN,
Attorney at Law,
For the Defendants.

Proceedings

The Court: Gentlemen at the Bar, have you any matters you want to take up preliminary to the trial of the case? As I gather, from a very cursory and very quick examination of the pleadings, the whole issue is between two subcontractors in this case.

Mr. Nesbett: That is true, your Honor, and Mr. Dunn was here a moment ago and he just stepped out.

The Court: He will be here in a moment, and—Several subcontractors were named that apparently had nothing to do with it because the controversy is between the Stuart Construction Company and the Oaks Construction Company, isn't that it?

Mr. Nesbett: That is true, your Honor.

The Court: And I think that there is a lot of alter egos here. I take it the plaintiff is really the so stated Stuart E. Tope as an alter ego of the Stuart Construction Company?

Mr. Nesbett: Yes, sir.

The Court: So I take Oaks Construction Company was a subcontractor and the plaintiff had a subcontract under the Oaks Construction Company.

Mr. Nesbett: Yes, your Honor. This involved a section of the pipeline clearance work and three contractors joined together in a joint venture to be the prime contractor.

The Court: Yes—You mean, were the prime contractor?

Mr. Nesbett: Yes, sir, they were the prime contractor for the clearance work. [5*]

The Court: I see.

Mr. Nesbett: And those three companies were Williams Brothers, McLaughlin, Inc., and Marwell.

The Court: I see, and each of them had a section of the road, did they?

Mr. Nesbett: No, sir. They were just three general contractors that joined together as a joint venture and apparently bid this in so they got the job of clearing the six or eight hundred miles of pipeline right of way.

The Court: From some place to Fairbanks?

Mr. Nesbett: From Haines, Alaska, to Fairbanks.

The Court: Where is Haines?

Mr. Nesbett: Haines, your Honor, is south of here and close to Juneau.

The Court: I see.

Mr. Nesbett: And the defense aspect of building this pipeline was to have an unloading point for tankers that could come up the inside steamship passage from Seattle.

The Court: And then pump the oil up?

Mr. Nesbett: And pump the oil clear to Fairbanks without having to come out in the open sea, so in order to build the line to Haines from Fairbanks area, you have to cross a portion of the northwest tip of Canada.

The Court: Yes.

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

Mr. Nesbett: So these three contractors joined as a joint [6] venture, called up here, called themselves Williams, McLaughlin and Marwell.

The Court: Were they the general contractors?

Mr. Nesbett: They were the prime contractors.

The Court: They were?

Mr. Nesbett: Yes. So then they turned around as we are informed here, and from the depositions, the information we have gathered, they turned around and subed the clearance work to one of the prime contractors, Williams Brothers; in other words, he became a sub to his own prime contract. Then Williams turned around and subed a portion, if not all, of the work to Oaks.

The Court: I see, and then Oaks——

Mr. Nesbett: And Oaks turned around and subed again.

The Court: So really in the trial of the case (I don't like to talk about it unless Mr. Dunn is here) but the main controversy—or the controversy is between Oaks Construction Company and the plaintiff?

Mr. Nesbett: That's true. The prime contractors were named because the Miller Act was involved, and——

The Court: Exactly.

Mr. Nesbett: And that was the reason. I was going to cover all that in the opening statement.

The Court: That is good because—Now, Mr. Dunn, you represent the defendant?

Mr. Dunn: That is true, sir. [7]

The Court: And are you Mr. Nesbett?

Mr. Nesbett: Yes.

The Court: Mr. Nesbett, and Mr. Dunn. Mr. Dunn, we were just talking about the issue here, and Mr. Nesbett was explaining the ramifications of these various contractors and how it all came about, and how that there was a general contract and then subcontracts even from the general contracts to sublet, contract, each other, and your client then was a subcontractor under the Oaks Construction Company. That is correct, is it?

Mr. Dunn: Yes, sir. I think, however, that the pleadings are a little bit in error here.

The Court: Well can that be straightened out in your opening statements?

Mr. Dunn: I am not sure Mr. Nesbett is apprised of this, just in order to keep the record straight, he alleges in his complaint that Williams Brothers Company, McLaughlin, Inc., and Marwell Construction Company, Ltd., entered into a subcontract with Williams and McLaughlin, and then he proceeds to the effect that Oaks entered into a subcontract with Williams Brothers.

The Court: Well that may be but I regard that as unimportant because I understand if Oaks Construction Company was a subcontractor, then I understand that your client, that is you represent Oaks Construction Company, and that the plaintiff subcontracted from Oaks Construction Company.

Mr. Dunn: That is correct. [8]

The Court: Well that is the whole issue here then, and it is claimed by plaintiff that Oaks Construction Company owes him money, so that I take

it—regardless of these other averments that that will be the issue in the case.

Mr. Dunn: Well, your Honor, it seems to me that the pleadings should, and I don't care because if anything this is advantageous to me, but it seems to me that the pleadings should establish the connection of Oaks Construction Company through whatever subcontracts might exist to the prime contractor.

The Court: Well is it—is there a controversy at issue as to whether the Oaks Construction Company was a subcontractor?

Mr. Dunn: Actually I don't know what terminology you want to use. Oaks Construction Company was what I term a sub, subcontractor.

The Court: Exactly a sub, subcontractor, and your client was sub under the Oaks Construction Company?

Mr. Dunn: Mr. Nesbett's client.

The Court: I mean Mr. Nesbett's client.

Mr. Dunn: Yes, sir, that is true. The only thing is I was thinking for the sake of the record it might be well to have that connection reflected in the pleadings. There is a gap in it the way it is now. I don't care.

The Court: I couldn't rule on that until I hear the opening statement, Mr. Nesbett will make the opening statement—until I find out. [9]

Mr. Nesbett: The statement I gave, your Honor, on the connection between the companies was what I had gathered from taking depositions in the case but in any event, your Honor, the main issue here

is whether or not Stuart Construction Company, Inc., which was a corporation in existence in November and December of 1953, entered into a binding contract with Oaks Construction Company to clear a certain section of the pipeline.

The Court: That's the way I gather it.

Mr. Nesbett: Now, the copy of the contract that was signed by the parties, that is by Oaks and Stuart Construction Company, Inc., is pleaded as an exhibit to the complaint, your Honor.

The Court: Yes.

Mr. Nesbett: And the point that we are making here, at this time now having had as much time elapse as has elapsed and having taken the depositions that we have taken and knowing the facts that we know, our position is that although a formal contract was signed by Stuart Construction Company, Inc., by its president, Stuart Tope, who sits here at the table with me, that actually as a matter of fact that contract was never followed, that Oaks, Carl Oaks, a partner in Oaks Construction Company, Inc., disregarded the contract from the very beginning and that Stuart E. Tope, who is also a plaintiff in this case is entitled nevertheless to recover the reasonable rental value of the caterpillars and other equipment that he used on this job because he did spend many hours on the job working, whereas he was not given the leeway or the authority of a subcontractor. Now, in that connection, your Honor, we will show [10] by the testimony of Mr. Tope that he first discussed participating with Mr. Oaks on this pipeline clearing on

November of 1953 in Anchorage, that at that time Mr. Oaks asked Mr. Tope, and they had known each other before that, "Will you lease me the three caterpillars that you have to use on this pipeline that I have a subcontract"—or "I expect to get a subcontract," that Mr. Tope said "no" he would not lease them, that sometime later, when Mr. Tope was awarded the subcontract, they again discussed it and the result of that discussion was the signing of the contract that is attached to the complaint as Exhibit A.

The Court: And you have stated in your complaint that that contract was he was to furnish tools, labor, equipment and supplies to clear a portion of the right of way?

Mr. Nesbett: That is right, your Honor. Now, the evidence will show that of the total right of way that Mr. Oaks was a subcontract—or as a sub, subcontractor, to clear the mileage, was approximately some 600 odd miles.

The Court: Yes. Well, Mr. Stuart didn't take over all of that, did he?

Mr. Nesbett: No, sir. That as of—as far as Mr. Stuart Tope is concerned, he agreed to clear approximately 100 miles of that pipeline right of way roughly between Tok Junction and a place called Big Delta, Alaska.

The Court: Now, will you tell me again, Mr. Nesbett, did Mr. Stuart's contract—was for what distance? [11]

Mr. Nesbett: Approximately 100 miles of the

total right of way clearing that Mr. Oaks had as a subcontractor.

The Court: Yes. And it was between what point?

Mr. Nesbett: Between Tok (T-o-k) Junction and Big Delta.

The Court: And Big Delta.

Mr. Nesbett: Big Delta, yes, sir. That is the name of the city.

The Court: Is that this end of it or close to Fairbanks? It is not important. I just asked out of curiosity.

Mr. Nesbett: Actually I believe it is toward the Haines end and toward Fairbanks to go to, then go to Big Delta, or at least the northerly end. It is over reasonably close to the Canadian border. Now, the price per lineal foot that this contract called for was 6½ cents. The contract will show that as a subcontractor, Stuart Construction Company, Inc., was required to furnish performance and payment bonds in each, in the amount of one-half the contract price, that Stuart Construction Company was to handle the payrolls of its own employees, that it was to carry the workmen's compensation insurance, public liability insurance and on the men that it employed.

The Court: Those were all conditions precedent—that is that Stuart Construction Company was to furnish an insurance bond or fidelity bond in matters of that kind?

Mr. Nesbett: That is true.

The Court: To qualify himself to take on the contract?

Mr. Nesbett: Yes, sir. Now, your Honor, the evidence will [12] show that the contract, after it was signed by the two parties on December 17 of 1953, that Mr. Tope was instructed by Mr. Oaks to get the performance and payment bond that he was required to get under that contract, that Mr. Tope although he has been in the construction business a number of years and has operated heavy equipment on jobs that actually he had never entered into any formal contract of this nature before, that he attempted to get a performance bond here in the area and couldn't do it, that he tried two places in Anchorage, was unable to get it and informed Mr. Oaks that he could not get the performance bond or the payments bond and Mr. Oaks sent him, or recommended that he see another contractor here called William Olday, who might go his bond, and he contacted Mr. Olday and Mr. Olday contacted Mr. Oaks and Mr. Olday deferred a decision on whether or not he would go the performance and payment bond for Tope until he had made a trip out to the States and come back; that in the meantime, Mr. Oaks had told Tope, Stuart Tope, take your equipment on up and get ready to go to work, that if anyone asks you your status say you are working for me. Oaks himself, of course, was bonded for five hundred thousand dollars to perform the whole pipeline; that as a result of those conversations and occurrences, Mr. Tope, with some of Mr. Oaks' equipment, removed the last two of his caterpillars, large D-8 caterpillars that were in this area, two in the area of Tok

Junction, in order to commence work; that he had no money; that Mr. Tope had no money and advised Mr. Oaks that he had no money, only the equipment, and that Mr. Oaks put him on his, Oaks', payroll [13] as a foreman at \$250.00 per week, and Mr. Tope was carried all through the time he worked on the pipeline on Mr. Oaks' payroll as a foreman at that wage; that as far as the employees that were to be hired initially to operate Tope's three cats, Oaks himself dictated to Tope who those employees would be; that after he had arrived in Tok Junction and had commenced operation on the clearance of his section of the pipeline, which commenced about January 3, 1954, Mr. Tope himself for the first time attempted to hire a man to operate one of his cats, that he attempted to hire a man named Arthur Harlan and on his first attempt to hire a man he found that he was not given the authority by Oaks Construction Company to hire anybody; that as a result of learning that, he had a showdown with Oaks Construction Company's general superintendent of the whole area of the pipeline, a man named Roy Crawford, and he was advised by Crawford that Oaks was paying the men and Oaks would determine who was to work on the cats. Secondly, that in attempting to direct the men who were running his caterpillars out of Tok Junction, Mr. Tope learned immediately that he was to take orders from a man named Hager, Warren Hager, who had been placed on that section by Oaks Construction Company and advised that he was in charge of the operations; that it was not more than

three or four days after that he and Hager, that is Tope and Hager worked together, that they had a showdown on that point. The showdown was taken to Roy Crawford, the General Superintendent for Oaks, and to Oaks himself, who came through there, and that they informed Tope that he was taking his orders [14] from Hager.

The Court: Who was employed by Oaks?

Mr. Nesbett: Yes. As well as Mr. Crawford who was the general superintendent of Mr. Oaks.

The Court: Under Oaks?

Mr. Nesbett: Under Oaks. That Mr. Tope, not having any money and not meeting his payrolls and not having his bond and not having anything except the equipment went ahead nevertheless under that arrangement, your Honor, that—of the equipment furnished by Mr. Tope, three of the main pieces were large D-8 Caterpillar tractors, which as of that time were the largest tractors available on the market. Since that time there has been a D-9 put on the market, I understand. That Mr. Tope was buying those three caterpillars and had been buying them since June, July and August of 1953 on a contract.

The Court: What you mean by that was he was paying for them on the installment plan?

Mr. Nesbett: Yes, sir.

The Court: Sort of a conditional sales?

Mr. Nesbett: No, sir, it was not quite that but it was very similar. It was a contract like this, your Honor. It was given by the Northern Commercial Company of Fairbanks. That is a large—

The Court: Well as far as Mr. Oaks is concerned he was the owner of them?

Mr. Nesbett: Well, I will point out later, your Honor, [15] that might have—could have been Mr. Oaks' stand but it didn't turn out to be his stand later.

The Court: I see.

Mr. Nesbett: Mr. Tope was buying these three caterpillars on what they call a rental-option purchase agreement with NC Company, the total price to be anywhere from eight-twelve thousand dollars for each piece of equipment, that the rental was to be so much per month except during the winter and spring months. If he didn't use the equipment there was to be no rental charge; that after he had paid one-third of a certain amount, he could then exercise an option to buy the equipment and all previous rental payments would apply on the purchase price.

The Court: Title remained in the vendor?

Mr. Nesbett: Yes, under that contract until an exercise of the option had been made by the vendee; that all three pieces of equipment were under such contracts at the time he started to work on the pipeline; that in anticipation of the needs of that pipeline job, Mr. Tope went to the NC Company in Fairbanks and purchased a new 2½-ton Dodge truck, which had on it a 500-gal. fuel tank.

The Court: Did he buy that outright?

Mr. Nesbett: He bought that under the same rental purchase arrangement that he had on the caterpillars; that he also purchased a Ford station

wagon from a used car company in Fairbanks at a price somewhere in the neighborhood of \$700, and that he had as his own, at the time he commenced to work on the job, a 2½-ton or [16] rather, pardon me, a half-ton GMC pickup truck, so that he had that——

The Court: Did it belong to him?

Mr. Nesbett: That belonged to Mr. Tope, yes, sir.

The Court: And the station wagon, too, belonged to him?

Mr. Nesbett: Yes, and the 2½-ton fuel tanker and the three caterpillars.

The Court: Well——

Mr. Nesbett: Now, that after Mr. Olday, the general contractor whom he had contacted concerning the performance bond, returned to Anchorage from the United States, he advised Mr. Tope that he could not go the bond, that he would not go the bond, that he had investigated and had been told not to get involved in that particular job. Mr. Olday's deposition is here and he will probably be called as a witness. In any event, that was probably in the middle of January of 1954. Mr. Tope had then been on the job almost two weeks. That Oaks asked Tope to get his performance bond thereafter, that Mr. Tope tried to and couldn't and told Oaks that he had no bond, and that nevertheless the parties went on under the——

The Court: That was the second time?

Mr. Nesbett: Yes, sir.

The Court: And he was already engaged in work, and Mr. Oaks then said go ahead?

Mr. Nesbett: Well Mr. Oaks didn't say stop and he didn't say anything. He did ask him, as far as we know, to get the bond. Tope tried again and said "I can't get it," and they continued [17] on under the arrangements I have described.

The Court: Making \$250 a month?

Mr. Nesbett: \$250 a week. That during all this time, Oaks or his sub-officials dictated who would be employed on the cats; that Oaks paid all the employees that ran Mr. Tope's caterpillars; that Oaks Construction Company carried the Workmen's Compensation Insurance on the men and other insurance that was required to be carried by law on the equipment and the men, and that that arrangement continued throughout the entire relationship which will come before your Honor here piece by piece. That Hager, the man who was immediately over Mr. Tope on that section of the clearance, bossed the caterpillar operators, that he would not let Tope direct the men as to their particular activities and that in effect, and because of the weather and other circumstances, Tope became a repairman and a man that went out and scrounged and bought parts for these caterpillars so as to keep them operating. The evidence will show that in January——

The Court: He paid for the parts himself?

Mr. Nesbett: That he went to the Northern Commercial Company where he was buying these caterpillars and charged the parts.

The Court: To himself?

Mr. Nesbett: Yes, sir.

The Court: Had them charged to himself?

Mr. Nesbett: Yes, your Honor, that is true. The evidence will show in January and February of 1954, the weather in that area [18] of Alaska was extremely cold, going as low as 65 degrees below zero, that the breakage of caterpillar and all metal parts in temperatures as extreme as that is very, very high. That only after they had proceeded out of Tok Junction approximately twelve miles, they ran into, in the area of Cathedral Bluffs, a large rocky area; that the snow was three to four feet deep and the rocks were covered with snow; that with temperatures as low as they were the caterpillar operators would hit these rocks not knowing they were there and break almost every conceivable part of the caterpillar at one time or another and it kept Mr. Tope busy going to Fairbanks getting parts, getting them back and replacing them in order to keep the cats operating. That when they found out they were in this rocky area and realizing the temperature was as low as it was and causing breakage, that Mr. Tope then asked Mr. Hager and Mr. Crawford for permission to move his entire operation from its then location up to Big Delta, the other end of the line he was to clear and to work back toward Tok Junction so as to approach the rocky area only after the weather had moderated, the snow had melted and the caterpillar drivers could see the rocks; that he on several occasions asked to be permitted to do this and that Hager refused, that Crawford refused, and he was

required to work right on through the rocks, which he did. The evidence will show that his caterpillars—that his first caterpillar finally went out of action in the middle of February of 1954 to stay out of action and it was no longer usable operating in these temperatures and on the rocks, had banged the engine up to a point where it couldn't function any longer; that the two other caterpillars and the other equipment [19] were used, continued to go on through the rocks, that his second caterpillar was finally put out of action in about the middle of April of 1954, and that his last caterpillar lasted finally through the rocks all right and was in use on the job until May 1st, until the payroll ending the week of May 1st, 1954, your Honor. In addition to paying the insurance, the payrolls, and paying Mr. Tope a foreman's salary as we have indicated, we will show that Mr.—that the Oaks Construction Company also paid the fuel bills incurred for the equipment that Tope owned and was being used. That——

The Court: But did not pay the repair bills?

Mr. Nesbett: That Mr. Tope—Well the evidence will show that Mr. Tope, aside from the repairs performed by Mr. Tope himself on the equipment, that later a mechanic was employed who helped to make repairs.

The Court: Employed by Oaks?

Mr. Nesbett: Paid by Oaks. That as to the parts used—The parts themselves were charged to Mr. Tope by the Northern Commercial Company in Fairbanks. That after Mr. Tope had attempted

to employ a man named Harlan as a cat driver at the time of commencement of the job, he did shortly afterwards, within a possible two or three weeks, employ Mr. Harlan to work on one of his caterpillars which was down temporarily; that Mr. Harlan did that but that Oaks refused to pay him and that Harlan himself never went to work on the job until——

The Court: Mr. Tope paid him? [20]

Mr. Nesbett: He has never been paid. He will be here as a witness in this case, your Honor. He hasn't been paid for the three days he first worked when Mr. Tope put him on the job, when he was forced to leave a job because he was told that he couldn't work there unless he was put on by Mr. Roy Crawford and Mr. Crawford wouldn't put him on.

The Court: That is the reason why they wouldn't pay him?

Mr. Nesbett: Yes. They wouldn't pay him the second time because he did repair work at the instance of Mr. Tope apparently and not at the instance of Crawford or Hager, and therefore he was never paid. He was not paid for some other work that he did for Oaks Construction Company. The evidence will show, your Honor, that Mr. Tope was backed up on one occasion when he fired one of the employees and that was, as far as we know, the only exercise of authority that he was ever permitted to use on this whole pipeline clearance job. Now, the evidence will show that the man Hager and Mr. Tope didn't get along very well

and approximately six weeks after January 3, commencement of the work, Hager was transferred to some other section of the pipeline by Oaks and a man named Vincent Abbott was transferred in to be—to take Hager's place, that the relationship between Abbott and Tope was the same as that that existed between Hager and Tope.

The Court: That is to say that he didn't recognize Mr. Tope's authority?

Mr. Nesbett: He didn't recognize Mr. Tope's authority [21] at all. Now, the evidence will show that while Mr. Abbott was running that particular section in place of Hager, that without any reference or consultation with Mr. Tope as a subcontractor, that Oaks or some official of Oaks Construction Company caused another caterpillar to be moved down into that area and this caterpillar was rented from a company called Rogers-Babler Construction Company.

The Court: Rented by Oaks?

Mr. Nesbett: Rented by Oaks or some one of his officials and sent down there to work on the job. That Tope was never consulted, that he only knew the job—cat was to be used on the job when he saw it show up and commence to work. The evidence will show that three caterpillars were later brought in in the latter part of February of 1954, these caterpillars being rented from McLaughlin, Inc., one of the joint ventures in this particular clearance contract.

The Court: They supplanted the caterpillars of Mr. Tope?

Mr. Nesbett: They, McLaughlin.

The Court: Either supplanted them or did the same work?

Mr. Nesbett: Yes. They brought their three cats in at Mr. Oaks' instigation and without Mr. Tope's knowledge until it occurred and put them to work on the Big Delta end and worked them back to meet Tope.

The Court: You mean that Mr. Tope wanted to do?

Mr. Nesbett: That is what Mr. Tope wanted to do and was not permitted to do, and the evidence of the witnesses will show that McLaughlin's specific instructions when those cats were [22] permitted to go to Big Delta and work back was that they were to be kept out of the rocks in the area of Cathedral Bluffs, your Honor. That those events, that is renting caterpillars and putting other drivers on that section of the clearance, those things occurred long prior to a letter written in April which, April 16th, which told Mr. Tope that they felt that they should invoke a section of the contract quoting the paragraph number which would permit them to take over and finish the work at his cost. If they felt that he wasn't going to get it done in time, and the evidence will show that the hiring of the other caterpillars occurred long before they had ever given him any such written notice, and that he was not consulted under the arrangements of the contract, as a subcontractor, that he was never treated as a subcontractor throughout the entire operation, and that nevertheless, owning the

equipment, he should be permitted to recover the reasonable rental value of the equipment that was used, which benefitted Oaks. We will show the exact number of hours, your Honor, that each D-8 cat was operated on that job, the day and the hour, the day and number of the hours, and we will present evidence to the effect that to prove that \$25.00 per hour is a reasonable rental rate for a D-8 caterpillar in winter time operation, such as they were engaged in in that area, \$25.00 per hour being that charged by a contractor or owner who furnished the caterpillar, furnished the driver, furnished the fuel, lubrication, and paid the wages of the driver, and took care of all the maintenance.

The Court: That is they did that at a rental of \$25.00 [23] an hour?

Mr. Nesbett: Was a reasonable rental.

The Court: Now, I understand this case Mr. Tope didn't pay the driver, didn't dictate to the driver, didn't pay the expenses and fuel bills, is that right?

Mr. Nesbett: He didn't do that; that is conceded. He didn't do any of that, and so we have taken the figure of \$53,620, which we allege in our complaint as being the value of Mr. Tope's services and equipment, and we have caused an accountant to prepare the cost of operations of that equipment in that area; that is the ages of the men, the fuel oil used, and in preparing this cost of operations, they have used the statements of Oaks Construction Company, which were regularly forwarded to Tope showing the amount of the payrolls advanced and so on,

and arrived at a figure of \$17,000 approximately that should be deducted from the \$53,620 prayed for in the complaint.

The Court: Was there ever any conversation about the machinery, and I understand Mr. Tope was paid \$250 a week for his services there, is that right?

Mr. Nesbett: That is true, sir.

The Court: And was there ever any conversation about the use of the machinery that he had furnished?

Mr. Nesbett: Well the conversations between Oaks and Tope himself were very few. It appears from the depositions and the testimony that I have run across to date possibly Mr. Oaks was only [24] in that area three times during the entire time they were clearing it; maybe four, but that the sum total of the situation is this, your Honor, Oaks Construction Company is maintaining that a contract was in existence all the time and that Tope is bound by that contract and they have charged him all the fuel, all the maintenance, all the bills that they have paid in connection with Tope's operation as well as the rental on the three McLaughlin cats that were brought in, as well as the Rogers-Babler caterpillar rental, and as well as one other cat rental, they have charged that all to his account, against this contract, holding the contract as being binding against Tope and come out with a figure that Tope owes them something like twenty-eight or thirty thousand dollars.

The Court: They ask for permanent relief?

Mr. Nesbett: Yes, sir, and they are maintaining that a contract was in existence and was binding on him.

The Court: Was the contract December 17th, I believe you said, of 1953?

Mr. Nesbett: Yes, sir.

The Court: It was in force all the time notwithstanding the fact that he never got the performance bond?

Mr. Nesbett: That is true, sir. And they had forwarded to him, and we concede this, at regular intervals a recap of the payrolls of the men who were running his equipment, to Stuart Construction Company, Inc., and said they were charging him for those payrolls and from those payrolls Mr. Tope was able to determine the [25] man running a given cat and he figured the exact number of hours that each cat was used and he has only charged on the cat, for example, the one that went out of action on February 16th, that was the end of the rental as far as he was concerned, the sum total of the equipment situation as far as Mr. Tope was concerned. The evidence will show that as of May 1st he had two caterpillars completely out of action with broken down engines and other needed repairs to be done on them and only one that could operate, and that had the starting motor shaft broken and had to be pulled by another cat before it could be operated when he finally moved it off the job. Now, your Honor, there is one other aspect I would like to cover before I sit down and that is

the Northern Commercial Company account against Stuart Tope, and Oaks stepping into the picture with regard to clearing what they consider to be a lien. Now when Tope left this construction job, in the last week in April of 1954, he had not paid Northern Commercial Company any of the monthly rentals called for in his rental-option to purchase contracts. Northern Commercial Company, of course, were charging him the regular thousand or twelve hundred dollars per month rental rate that would be called for in the agreement if he used the caterpillars during those months. Northern Commercial Company in June of 1954 sent a written notice to Oaks Construction Company and also to Williams Brothers, the prime contractors, advising them that they claimed liens for rentals in connection with the usage of Tope's caterpillars on this pipeline job; that Tope himself had gone to Northern Commercial Company in [26] June telling them that he couldn't pay any rentals, he didn't know exactly where he stood as far as money was concerned, that in company with the credit manager of Northern Commercial Company in Fairbanks Tope and the credit manager went to the Northern Commercial Company's attorney who prepared a written notice to the prime contractor and also to Oaks telling them about Northern Commercial Company's lien; that after that notice was given and during the month of August of '54, Mr. Tope himself tried to arrange meetings between representatives of Oaks Construction Company and Williams Brothers and Northern Commercial Company to

try and work some arrangement out that would cause everybody to be satisfied for the use of the equipment. The evidence will show that a representative of Oaks Construction Company came to Fairbanks in August of '54, the day ahead of the scheduled meeting, and left Fairbanks before the meeting and refused to meet with Mr. Tope; that later in October of '54, and believing that Northern Commercial Company had a lien because some of the equipment that they had actual title to was used on the right of way, a settlement was finally negotiated between Northern Commercial Company and Oaks Construction Company. This settlement, as it was finally hammered out, provided that Oaks Construction Company or their bonding companies would pay to Northern Commercial Company the amount of the parts that were supplied during that operation to Tope's cats in the amount of some \$5,300.00, and that they would pay Northern Commercial Company half the amount of the rentals that Tope would ordinarily have paid them on their contracts, and so they [27] settled their two claims off. Tope was not present, didn't know that the settlement was being entered into, didn't consent to it, and still does not consent to it, but nevertheless, on the promised payment of something like \$10,700 NC Company agreed that they would not claim any lien against Oaks or against the prime contractor. Mr. Tope's position is that he had no part in that settlement and does not honor it; however he does admit that he owed them rentals on the equipment and he does admit that he owed

them for the parts that were involved. So, your Honor, of the \$53,620 that we claim, there is, we concede, to be deducted approximately \$17,000 that is what would have been the cost of operation of that equipment if Mr. Tope had met the payrolls, furnished the gas and oil and so forth. And further, there is to be considered from the \$36,922 that would be left, the matter of the fact that NC Company received \$10,798.00; at least \$5,300 of it Tope admits went to pay bills that he owed for spare parts. The sum total of the situation, as far as Tope was concerned, when May 1st came around, two of his cats were thoroughly out of action and he had no money to repair them; one was just able to run; that the result of the prolonged negotiation or failure to enter into or complete any negotiation was that he lost all of his equipment; he lost all of his equity in it.

The Court: That is the vendor took it back?

Mr. Nesbett: The vendor took it back and so he wound up with nothing except two lawsuits, which were filed against him, one for \$3,000 fuel bill, which Oaks Construction Company had guaranteed to a [28] man named Bayless, running the Franklin Mining Company, which they did not pay.

The Court: Used in this operation?

Mr. Nesbett: Yes, sir, which was used in this operation, and actually what happened was Franklin Mining Company hadn't been paid regularly by Oaks and so they cut off the fuel to Tope's spread as they call it. They call a group of caterpillars and equipment up here a spread, you will notice in the

testimony. He cut off Tope's—the fuel to Tope's spread so that immediately caused a meeting between Roy Crawford, Oaks' superintendent and Mr. Bayless, who was supplying the fuel, and Mr. Tope. The result of it was Mr. Crawford told Mr. Bayless that Tope would be paid something on his contract sometime soon and by reason of that Tope wrote a check for \$3,000 to Bayless on the promise of Crawford that by the time it had gone through there would be funds in the bank to honor it. Well it didn't go through; it came back NSF. The evidence will show, and we have Mr. Bayless here to so testify that after and apparently by reason of the hard feelings that had developed between Tope and Oaks that Oaks sent a representative to see Mr. Bayless in Tok Junction and tell him that they should pursue Mr. Tope to collect this \$3,000; that this representative, the office manager and accountant for Oaks, told Mr. Bayless that if he would institute criminal proceedings against Tope for that NSF check that Oaks—

The Court: Because of the fact that no funds were in the bank? [29]

Mr. Nesbett: Yes, sir.

The Court: That is a local territorial law?

Mr. Nesbett: Yes, sir. There is a statute against writing NSF checks. That if Bayless would cause criminal proceedings to take place against Tope that he, Oaks, would reimburse Bayless for any expense he was involved in getting the District Attorney after Tope. That another law suit has resulted and Tope is the defendant in that suit

he is informed, commenced by Mr. Harlan who, as I have mentioned, worked for Mr. Tope, or on his equipment, at various times but was never paid by Oaks Construction Company and that Mr. Harlan never got employment on that clearance job; after the three caterpillars were rented from McLaughlin Brothers and when McLaughlin sent them down with instructions they were to stay out of the rocks, they also insisted that no one but Harlan should take care of those cats, and then only then did Harlan get on the payroll although Tope tried on three occasions to put him on and had been overruled, so Mr. Harlan has commenced a suit.

The Court: Against Mr. Tope?

Mr. Nesbett: And Oaks.

The Court: He sued both of them?

Mr. Nesbett: Yes, sir. And those—both of those suits I mentioned were filed in Fairbanks. And so, your Honor, our claim we concede is \$36,922.00. We have charged as what Mr. Tope has set out as a reasonable monthly rental on the 2½-ton Dodge truck of eight months, for three months and three weeks, the Ford station [30] wagon \$250 a month for three months and three weeks, and the GMC pickup \$250 a month for three months and three weeks. That winter operation in all this equipment is extremely hard on it and it depreciates rapidly. The evidence will show as a matter of fact that in order to lubricate or oil these caterpillars, that extreme temperatures they're working at, your Honor, they shoveled lubricating oil out of the barrels and put it into pots which they heated over

blow torches before they could get it to a consistency to pour into the crank case and that as a matter of fact, for one week after Tope had commenced operations the equipment had to sit idling and run twenty-four hours a day simply because at sixty-five below they found they couldn't operate at all. That somewhere between \$36,922.00 and making allowance for the parts that Mr. Tope concedes he owed NC Company for, that the judgment in favor of Mr. Tope should be in the neighborhood of \$30,000.00 for the use of that equipment.

The Court: Did both parties sign the contract on December 17th?

Mr. Nesbett: They did, yes, sir.

The Court: All right. Mr. Dunn.

Mr. Dunn: Your Honor, it seems to me that even before making an opening statement that I should now move for summary judgment on the first cause of action. I believe Mr. Nesbett stated that the formal contract was never followed but nevertheless, Mr. Tope, as an individual, is entitled to be recompensed I take it on the basis of quantum meruit claim, and if your Honor sees fit to grant [31] that it will of course simplify these proceedings here.

The Court: Well, according to the statement by Mr. Nesbett, both parties proceeded upon the contract, upon the theory that it established a relationship between them. Now, if they did, the suit is here on the contract; that's the burden of the contract. I mean that is the burden of the law suit. The issue, as I understand, is on the contract, and he

says that while some of the conditions precedent were not observed, nevertheless, in part they were on the contract and part in private employment, but in the end he says that they treated the contract as having been violated by the plaintiff and took over and charged him, for instance, the expense of these new cats they got that were brought on, so I don't think—I am not familiar enough with it at this time to make any ruling, as you ask. I will withhold ruling on it, however, until the case develops, and if later on it appears that it ought to be sustained, I will be happy to urge it.

Mr. Dunn: Thank you, your Honor.

The Court: Apparently they all signed the contract?

Mr. Dunn: By all, your Honor.

The Court: That is the two parties here. As I understand, the only parties here, really it is a suit between Mr. Tope and Mr. Oaks?

Mr. Dunn: Well Mr. Tope is not a party to the contract.

The Court: No, sir. I understand that, but I think you allege in your answer that it was an alter ego, that really he is the corporation? [32]

Mr. Dunn: Yes.

The Court: And I take it, as far as Mr. Oaks is concerned that Mr. Carl E. Oaks, that is corporate entity, is an alter ego. I assume that.

Mr. Dunn: Well that is—I'd just as soon you didn't assume, your Honor. Oaks Construction Company—you mean Mr. Oaks is saying that Oaks

Construction Company is his alter ego. That is a partnership, sir.

The Court: It is a partnership. Very well. Not a corporation at all?

Mr. Dunn: Beg your pardon.

The Court: And not a corporation at all?

Mr. Dunn: No, sir.

The Court: And is not the alter ego of Mr. Oaks?

Mr. Dunn: No, sir.

The Court: Very well, if it is. I'd take it as much to say he had a partner in the matter.

Mr. Dunn: He had two, yes, sir. Well, your Honor, what I anticipated to be the least, in my point of view, the difficulty in this case, is already beginning to appear.

The Court: Yes. It is a very complex situation, I would say.

Mr. Dunn: I prefer the word "confusing" and "inconsistent" to complex, your Honor.

The Court: Very well. [33]

Mr. Dunn: Throughout the pre-trial proceedings (I use that word loosely, not technically), I have been impressed by inconsistency. Now it began with the complaint which of course is permissible to allege inconsistent cause of action, and that inconsistency permeates action. It seems to me at one time Mr. Tope is saying "yea" and Stuart Construction, Inc., is saying "nay," and I think one of the things that would be wise for us to be careful about here is to keep these parties separate throughout the trial. Now, our position generally is this:

I don't think, and I hope that we will be able to establish the fact that there is any difference between Stuart Construction Company, Inc., and Stuart E. Tope. I think they're one and the same. We contend that whatever work was performed on this particular section of the pipeline was performed under a contract.

The Court: That is under the contract of December 17th?

Mr. Dunn: That is true.

The Court: Now, for your Honor to avoid possible confusion on the geography, I could if Mr. Nesbett consents, furnish you with the road map because we will be speaking of north and south and actually that road doesn't run north and south; it runs from northwest to southeast.

The Court: Well, I just assumed that running through main location in Fairbanks that that would be right, running toward Juneau, because Fairbanks is northwest of Juneau.

Mr. Dunn: Fairbanks is pretty well north, I believe, of [34] Big Delta and you proceed from Fairbanks to Big Delta, I think you'll find your travel pretty much southeast to Tok.

The Court: That is to get to the southern terminus of the pipeline?

Mr. Dunn: There again, your Honor, no, because that pipeline just keeps right on going. It goes all the way through Canada.

The Court: I said terminus. I am thinking about this—these contracts. That is, as I understand, the

contracts covered the pipeline from some point near Juneau up to Fairbanks.

Mr. Dunn: The prime contract?

The Court: Exactly, the prime contract. So we have nothing to do with the pipeline as it went on other places.

Mr. Dunn: Well, actually, your Honor, I think the only part of it—the only contract with which we are concerned and the only part of the line with which we are concerned is that portion between Big Delta and Tok Junction.

The Court: Exactly. That section, the area covered by the contract.

Mr. Dunn: Which I think you will find approximately 100 miles.

The Court: That is what counsel said.

Mr. Dunn: And is, in fact, a very small portion of the overall line.

The Court: I understand that.

Mr. Dunn: To return, we don't think there is any difference [35] between Stuart Construction Company and Mr. Tope. We think whatever work was done was done under the contract, and the contract which we speak of is the one which is attached to the complaint, December 17th or whatever it is, and we contend that we paid every cent called for by that contract, and as a result of paying every cent called for by the contract, we owe neither Stuart Construction Company or Mr. Tope anything and that further, we paid a lot more than what was called for by that contract, and that as a result,

Mr. Tope and Stuart Construction Company jointly owe us the amount of that overage.

The Court: I understand from Mr. Nesbett the Oaks Construction Company took over the contract and completed it; that is they claimed they did that but when they went out and got additional caterpillars and other equipment——

Mr. Dunn: That and also, your Honor, this point will come out and we consider it quite important, and it is that Mr. Tope received weekly invoices of charges made against Stuart Construction Company.

The Court: Well, to clarify it in my mind, Mr. Dunn, Mr. Nesbett indicated they put him on the payroll. Was that a mere drawing account of \$250.00 a week?

Mr. Dunn: Yes, or more accurately stated, for the sub-contractor to be put on wages or on a salary so that he has got pocket money. I don't know how familiar your Honor is with construction. You may know one hundred times more about it than I—[36] it is possible that I know as much about it as you.

The Court: I expect you know more about it. I have—well I have tried many contracts of this nature, at different times; like you say they have different customs but if you are under a contract why of course they had no right to put him on a salary as if he were an employee. If they were operating under this contract, it couldn't be more than a drawing account and notwithstanding they may have characterized the negotiations with the custom, put him on a salary, and—but technically

the effect of it would have to be a drawing account.

Mr. Dunn: Yes, sir. Now the way these things actually work is this: The person to follow down through the chain of command on one of these contracts, at least this is my understanding of it, and if I remember correctly, I'll like being corrected by Mr. Nesbett: My understanding is that the person who has really got the money is the United States Government, and everybody is more or less working on the money of the United States Government, and the farther removed you become from the prime contractor, the greater the reliance on the money of the United States Government. Now, your prime contractor is usually financially stable. They're big people. Williams and McLaughlin and Marwell, the joint venture, which was the prime contractor on this, individually each of them, as I understand it, have extensive holdings.

The Court: Well now, if I interrupt you, you tell me, Mr. Dunn, because it is my duty to listen to you and not your duty to [37] listen to me but do I understand Oaks Construction Company was not one of the prime contractors?

Mr. Dunn: That is correct, sir.

The Court: Very well.

Mr. Dunn: You see, we are concerned or rather—well we are concerned with 100 miles but the prime contract covering that 100 miles was concerned with 300 miles.

The Court: Or 600 miles. Whatever it might be we are not concerned with that in this case?

Mr. Dunn: Well I believe it was 300. Am I in error?

Mr. Oaks: Three hundred miles in Alaska and approximately the same in Canada.

Mr. Dunn: The section of the line from Fairbanks to the Canadian border was roughly 300 miles. Now that was let under one prime contract to Williams, McLaughlin and Marwell, a joint venture, consisting of three corporations. Now, that pipeline went to—went on over into Canada but that was under a separate prime contract. Now Williams, McLaughlin and Marwell, the prime contractors, as I mentioned before, apparently quite financially secure. They have a large bonding capacity and in turn start to sub this work out. It is a huge project, I imagine, hundreds of millions of dollars involved, and in this case, they subed the right-of-way clearing to one of the members of the joint venture, namely, Williams Brothers. And it subed the entire 300 miles insofar as right-of-way clearing was concerned. Now, Williams Brothers—and probably some more things, [38] too, beside right-of-way clearing; maybe the entire 300 miles of that line, I don't know.

The Court: And Williams Brothers sublet some to Oaks Construction Company?

Mr. Dunn: And Williams Brothers sublet the three hundred miles of pipeline clearing to Oaks Construction Company. That made Oaks a sub-sub.

The Court: And Oaks sublet 100 miles to plaintiff?

Mr. Dunn: Yes, Tope. He chopped it up in hun-

dred mile sections. Now following this, the financial picture here, you have got Williams, McLaughlin and Marwell, joint venture with combined assets that probably would be rather impressive; a subcontract to Williams Brothers, pretty financially stable in and of itself; from them, to Oaks Construction Company, who at that time was pretty well off, not any more but it was then; and then Oaks began to sub to the individuals that actually did the work. There were three of them, your Honor, and in all three cases, the man who headed the job comparable to the one Mr. Tope had was on the payroll. He had a drawing account, as you like to term it, and his men were carried on Oaks' payroll, and it was—it is very common to do that, and the reason is obvious, because these men don't have the money to do it themselves, and they are therefore, and it is common practice, and it is not condemnable; this is not critical of any one of them. They are working on government money. They rely upon what is known as progress payment. As the work progresses, they get paid and [39] usually they don't have enough money to carry their payroll long enough for these progress payments to carry them on through the job. And we can produce and will produce evidence to the effect that Mr. Tope requested this drawing account or this salary, and we can produce evidence and will that the subcontractors standing in Mr. Tope's shoes, and I use him synonymously with Stuart Construction Company, were grateful for being so given a drawing account. They needed it for living

expenses. As Mr. Nesbett said, when Mr. Tope went up there, he didn't have any money. He had to have some money and this is where it came from.

The Court: Of course now if I interrupt you, Mr. Dunn, you tell me but according to Mr. Nesbett, Mr. Oaks not only advanced for his payrolls but dictated who the employees should be, so he said, treated it as if he were not a prime contractor but, that is the subcontractor, but that he was simply employed and that the machinery was there in sort of a rental basis.

Mr. Dunn: It is on such things, your Honor, that issue is joined.

The Court: Exactly. Lawsuits develop your right.

Mr. Dunn: And we don't admit that at all.

The Court: That is the reason I made the suggestion so I would see what your attitude would be.

Mr. Dunn: And——

The Court: In others words now, if I get your contention, Mr. Dunn, is that contract was made and performance bond was all [40] waived and everything of that sort. All these conditions precedent were waived, and that he was operating under the contract, and that you followed the custom here of advancing money for his payroll and that you advanced money to him, and also to his payroll and charged against him on his contract?

Mr. Dunn: I agree with the bulk of what you say except for this——

The Court: Well I am not making a statement. My statement was an inquiry.

Mr. Dunn: Yes, sir, and my answer is "yes" with this qualification: That we do not admit waiving any bond.

The Court: I see. Well, of course, I——

Mr. Dunn: We will produce evidence that we did everything we could to get a bond out of Mr. Tope. Our contention is that we signed a contract calling for a bond.

The Court: Did he ever get a bond?

Mr. Dunn: No, sir.

The Court: Well the contract became effective and outstanding. You all acted upon the contract notwithstanding no bond was given, is that right?

Mr. Dunn: Well, your Honor, the contract was executed and became binding, and we understood that Mr. Tope was going to furnish a bond.

The Court: Yes.

Mr. Dunn: And he didn't. [41]

The Court: Yes.

Mr. Dunn: And we found out about it and we started hounding for it.

The Court: Yes.

Mr. Dunn: We did permit him to go to work but we did so with the understanding——

The Court: That he'd furnish a performance bond?

Mr. Dunn: That he would furnish the bond and even more, that beginning to doubt his ability to get the bond, and Mr. Olday was going to help him do it, and we can show, or possibly Mr. Tope will admit that throughout his presence on that job, Oaks and one of Oaks' representatives was after

him to put up that bond, put up the bond now; if you are thinking along a strict business line, as to the course of activity, I will—by Mr. Oaks whom I represent, in relation to his subcontract, I am going to have admit and possibly agree with you, if you are so thinking, that I don't think he acted too wisely.

The Court: Who's that?

Mr. Dunn: Mr. Oaks. I think he should have been a lot tougher than he was. I think that you'll see that that is not Mr. Oaks' nature but that, of course, is irrelevant.

The Court: The reason I suggested that originally it was an executory contract, and that executory contract provided for a performance or fidelity bond, not given, but the parties nevertheless were going, went on with it, and completed the contract. Well [42] I understand the defendant's claims. There was a default and they took over the contract.

Mr. Dunn: As a matter of fact, we claim, your Honor, that there was a default almost from the beginning because we do not admit the waiving of this bond requirement.

The Court: I see.

Mr. Dunn: Although we did——

The Court: Go on with the work?

Mr. Dunn: Be lenient with respect to the time of posting it and that it is for that that if I had to, and well I am, criticizing Mr. Oaks. He should have called a halt then.

The Court: Did you finally take over because

he did not furnish a performance bond or because the caterpillars broke down?

Mr. Dunn: No, your Honor—the failure to furnish a performance bond became one of many things. We allege, and we believe we can show that Mr. Tope did a very good job of doing a bad job in the course of this work. We feel that he messed.

The Court: He was doing a hard job, I take it is what you had in mind, doing a good job on a hard-to-do job?

Mr. Dunn: No. He did a good job of doing a bad job. In other words he very efficiently performed a poor piece of work, that he did not do a good job.

The Court: I see.

Mr. Dunn: And our allegation is that he broke practically every provision of the contract, and we can show a number of them, [43] and finally it got to the point where finally even Mr. Oaks lost patience. I wish he had lost it long before but that is water over the dam, of course. If you are interested, we will produce testimony that instead of these representatives of Oaks running the job, that they occupied a standard established position on the job, the job being to supervise the work of a subcontractor.

The Court: That is Mr. Tope?

Mr. Dunn: To supervise the work of Mr. Tope.

The Court: Oh, I see.

Mr. Dunn: Now, don't misunderstand that. Not to tell Mr. Tope how to do the work, not to tell Mr.

Tope what equipment he can use, what he can't, what men he can hire, which ones he has to fire; that is not the supervision of which I am speaking, but responsibility for this work goes through the chain of command from the workmen up to the prime contractor that we spelled out before and so a subcontractor must of necessity, oversee the work of the sub-sub to be sure that the work of the sub-subcontractor meets the requirements of the specifications so that the subcontractor in turn can answer to the contractor. And that was the reason for Mr. Crawford being there; Mr. Abbott being there; Mr. Hager being there. And I think as a matter of fact there were a couple more. I don't know. These construction people seem to come and go pretty fast. But that is our answer to——

The Court: Which they would supervise, the results or engineering, but Mr. Nesbett said they not only supervised the results [44] but supervised the means.

Mr. Dunn: I heard him. Now, I would like to make this comment, if I might: In the taking of these depositions, and there are several of them, and in the opening statement of Mr. Nesbett, there was reference and comment of (1), a number of things that I consider relevant, and I want to watch for those throughout the trial of this case.

The Court: I am glad you say that because the issue, as I conceive it, is a very narrow one.

Mr. Dunn: Yes, sir, and even at the risk of emphasizing these matters, as an example, quite a bit has been made of Mr. Tope losing all of his

equipment to the NC Company, Northern Commercial Company, their repossessing it under these lease-purchase——

The Court: Did they repossess it during the operation?

Mr. Dunn: I think the evidence will show Mr. Tope at their request returned it, if you want to distinguish between the two. And mention has been made that here Mr. Tope gave Mr. Bayless a \$3,000.00 check and Mr. Hancock, a representative of Oaks, comes up and tries to get him thrown in jail. Well, now, those are sympathy moving contentions but no such claim for damages is being made.

The Court: Do you think that is what a judge would call an obiter dicta?

Mr. Dunn: I am not a judge. I am not sure if that——

The Court: I didn't say that to display my Latin but——

Mr. Dunn: What I meant was I didn't understand your Latin. [45]

The Court: I said it was an obiter dictum, that is that that was a thing on the side.

Mr. Dunn: Yes, sir. And so to summarize, again, we don't think there is any difference between the corporation and Mr. Tope. We think we paid all the money we are supposed to pay.

The Court: Do I understand, Mr. Dunn, that ultimately there was a—Mr. Oaks declared failure on the part of Mr. Tope to maintain his contract and took it over?

Mr. Dunn: Actually, our contention of what happened is this, your Honor, that we wrote Mr. Tope or Stuart Construction Company and said, "Your are getting this thing pretty well messed up, and if you don't straighten it out, we are going to take over." Now, that may have been followed, I am not certain, by a letter saying "we are taking it over," but, in any event, before we did, Mr. Tope abandoned the project. He just threw up his hands and walked off. That is what we believe——

The Court: That will be your proof?

Mr. Dunn: Yes.

The Court: Very well.

Mr. Dunn: And, your Honor, aside from what is stated in the pleadings, I believe that outlines it fairly well.

The Court: Very well. Now, gentlemen, I think we ought to give the reporter a little rest because she has been taking all that was said. Then, gentlemen, you are ready to proceed with the evidence when we return? [46]

Mr. Dunn: I would—I have one preliminary matter that I would like to go into but with that exception, yes, sir.

The Court: Very well. Let the court stand recessed for ten minutes.

(The court recessed at 3:30 p.m., and reconvened 3:40 p.m.)

Mr. Dunn: Your Honor, before a witness is called, after Mr. Nesbett returns, I have a matter I'd like to bring to the attention of the Court.

The Court: Very well.

Mr. Nesbett: If your Honor please, my first witness will be Mr. Stuart Tope.

The Court: Very well. Counsel, Mr. Dunn says he has a matter he wants to call the attention of the Court to before the witness is sworn.

Mr. Dunn: Your Honor, before we begin to get into the trial of this case, I would like to demand the production of various documents that—I assume I have already seen. I assume I have seen all of them but I would like to have them brought in and marked for identification as soon as possible and those documents are all records of Stuart Construction Company, Inc., for rather—and of Stuart E. Tope, jointly and severally, that relate to this pipeline project. Now that would include books of account, check books, stock books, minute books, any instrument, any record that relates to the claim that the plaintiffs are now asserting.

The Court: That is in connection with this subcontract? [47]

Mr. Dunn: That is right, your Honor. Or if he is claiming outside the subcontract, in connection with that, connection with any claim he is now asserting in this Court.

The Court: Well of any claim here?

Mr. Dunn: Yes, sir.

The Court: Which would have to be within the subcontract?

Mr. Dunn: Well, I am not—here's—inconsistency again, your Honor, I am not sure of that. Is not its first cause of action based on a subcontract?

The Court: Well, the second cause is the same thing, both based upon the subcontract, the alleged subcontract and it is agreed here that there was a subcontract.

Mr. Dunn: It is agreed that there was a subcontract but, your Honor, I don't interpret the second cause of action as dealing with a subcontract, that is a written subcontract.

The Court: Well, it is unless I am unable to construe it.

Mr. Nesbett: Your Honor, the second cause of action is simply a quantum meruit claim.

The Court: And not under the contract?

Mr. Nesbett: Not under the contract, no, sir.

The Court: I see. Well, very well.

Mr. Nesbett: Our position is——

The Court: Very well—I see. Well, then, you want any statement they may have pertaining to either one?

Mr. Dunn: I want all records that deal with either. And, [48] your Honor, I'd like to go farther. The activities of plaintiffs in connection with this cause of action, too, part in the years 1953 and 1954, and I would like to have copies of the tax returns for Stuart Construction Company, Inc., and Stuart E. Tope, for the years ending 1953 and 1954, or should either be on a fiscal basis, fiscal year basis, for whatever fiscal years cover the period beginning December 1, 1953, and ending I think a safe date would be June 1, 1954.

The Court: Those are the two things?

Mr. Dunn: Yes.

The Court: Mr. Nesbett, what do you say about the records Mr. Tope made in relation to this subcontract either for himself or work that he did or for his company?

Mr. Nesbett: We have no objection to producing those. We have done it.

The Court: What do you say about copies of his tax returns that would be very brief, of the two years?

Mr. Nesbett: We have no objection to that, your Honor.

The Court: Very well.

Mr. Nesbett: As a matter of fact they have all been produced for Mr. Dunn in the past, over a year ago.

The Court: I see.

Mr. Nesbett: And now, your Honor, I would like to make—I have never made any demand from Oaks, but I would like to make the same request of Mr. Dunn on behalf of the Oaks Construction Company [49] in connection with the—yes, with the entire 300 miles of the pipeline that he was concerned with.

The Court: No—the 100 miles.

Mr. Nesbett: Well, Mr. Dunn apparently alleges or intends to prove that the other two operators, that is on the other 200 miles of the line were under the same arrangement. Therefore, I would like, if possible, the records of Oaks Construction Company concerning these other two operators, too.

The Court: You wouldn't want all of the details. You just want——

Mr. Nesbett: That is right but as to the particular Stuart Construction section I would want the same details that Mr. Dunn is requesting.

The Court: Yes. Very well. I think that is a reasonable counter request. In other words, if the other contract is—you don't want the checks and all of the stuff that went on in payment of the individuals. That would be endless here?

Mr. Nesbett: That is true.

Mr. Dunn: Your Honor, I am more than willing to give Mr. Nesbett anything that we can produce here. Most of which I have, I know, have in Court right now. But now, with respect to records——

The Court: Records of the defendant with relation to this subcontract or the employment, if it be such, with Mr. Tope.

Mr. Dunn: Well with respect to records dealing with other subcontract—— [50]

The Court: They're not asking for that. They want to know if it is on the same terms and same basis. They want the original arrangement, I understand. That is all they have asked for.

Mr. Dunn: Well Mr. Nesbett said, as I understood him, he was demanding the same record with respect to the other subcontractors because he understood that I was going to contend that the other subcontractors were working under the same arrangement as Tope. Now I haven't made any such contention, and

The Court: Suppose we let that——

Mr. Dunn: Matter of fact I think that would be irrelevant.

The Court: Suppose we let it go until we get to it—but what he does want though is what your records show with respect to this subcontract.

Mr. Dunn: The 100 miles that plaintiffs have.

The Court: Yes.

Mr. Dunn: That I can give. The other might be a great problem. They're old records, and we haven't dug them out.

The Court: It might be, and we can undoubtedly limit it, and I understand Mr. Nesbett is agreeable to limiting it. And if it does become relevant, I understand you are equipped so you can supply.

Mr. Dunn: I will do my best to supply. I don't know now. When are those to be produced?

The Court: What do you say, Mr. Nesbett? [51]

Mr. Nesbett: I can have the records he requests any time on an hour's notice. They're over in my office.

The Court: Tomorrow morning?

Mr. Nesbett: Yes, sir.

Mr. Dunn: I'll produce mine then. I wanted to use them tonight, your Honor. Now, one thing I particularly am interested in, Mr. Nesbett said I could have already seen these records. The bulk of them, as I said, I believe I have seen but I don't think I saw any stock book, and I'd like to see the stock book of Stuart Construction Company, Inc. I do not believe that was produced.

The Court: You mean for the certificates of stock?

Mr. Dunn: That's right.

The Court: Well of course, is that with the idea of saying whether it was a bona fide corporation?

Mr. Dunn: Yes, sir.

The Court: What do you say about that, Mr. Nesbett?

Mr. Nesbett: I don't know if the stock book would prove bona fide corporation.

The Court: Yes, it wouldn't because it may be a bona fide corporation and they would have no corporation at all.

Mr. Nesbett: He saw the certificates from the auditor which certifies it to be a corporation and went into that thoroughly on the deposition.

The Court: However it would not be of any trouble to produce the stock book. Have you got one? [52]

Mr. Nesbett: I think so, yes, sir.

The Court: There would be no trouble to do that for your inspection.

Mr. Dunn: Or the certificates of stock.

The Court: I take it they will be available; however at this time it doesn't seem to be relevant, except in the case that you want to challenge it is a corporation in good faith. I believe you allege it was not a corporation; it has not complied with the territorial laws.

Mr. Dunn: No, I didn't allege.

The Court: Didn't you do that?

Mr. Dunn: I may have denied their allegation that they did; I am not sure.

The Court: Probably did; that may be that is

where I saw it. I made a very hurried examination of the pleadings.

Mr. Dunn: Now, your Honor, let me make this in the nature of a suggestion and only a suggestion: Now, we have here a claim of Stuart Construction Company; we have a claim of Stuart E. Tope; we have a counter claim of Oaks Construction Company. I am wondering if your Honor wants to outline any procedure to be followed in the course of presenting these various claims?

The Court: No, sir.

Mr. Dunn: Or do you want—when a witness is called, do you want him to testify as to everything he knows as to all three of them? [53]

The Court: All purposes, I think that would expedite the trial, and indicating, however, so that my notes would show—well they would show that anyhow, just from what branch of action he was on. Now, are you ready to produce your first witness, Mr. Nesbett?

Mr. Nesbett: Yes, your Honor. Mr. Tope.

STUART E. TOPE

being first duly sworn upon oath, deposes as follows:

Mr. Nesbett: Before I commence with the examination, I would like to move that all witnesses except parties who are going to testify in this case be excused from the court room.

The Court: What do you say about that, Mr. Dunn?

(Testimony of Stuart E. Tope.)

Mr. Dunn: It is immaterial to me, your Honor.

The Court: Usually where that exclusion order is used for, witnesses scatter and sometimes delayed in getting them back. Now, since there is no objection, are there many witnesses in the court room? Let all the witnesses in this case, in the case of the United States for the use and benefit of Stuart Construction Company, will you stand up, all the witnesses in the case.

Mr. Nesbett: Apparently the only witnesses are my witnesses, your Honor.

The Court: Your witnesses. Do you ask that they be excluded?

Mr. Nesbett: I don't care. That is the situation. It doesn't matter to me.

The Court: What do you say about that, Mr. Dunn. Counsel [54] has asked to excuse the witness and found the other witnesses are his witnesses.

Mr. Dunn: Well, your Honor, he made the request.

The Court: Yes, he made the request.

Mr. Nesbett: I'll stand by it. It doesn't matter to me.

Mr. Dunn: I don't care.

The Court: I am going to enforce rules if counsel on both sides ask for it.

Mr. Dunn: It is immaterial to me once the witnesses are included, I am perfectly willing to go along. If he wants them to remain, but if he has his remain, I don't want mine later excluded.

(Testimony of Stuart E. Tope.)

The Court: Of course you would not want yours excluded, so what do you say now, Mr. Nesbett?

Mr. Nesbett: I think that I should just as soon they be excluded, your Honor, and then——

The Court: Very well, and then somebody will have to check the witnesses, all the witnesses—you who are witnesses in the case. The exclusionary rule has been asked for. That means that it will be necessary for you to retire from the court room but it is my duty to instruct you that you should not talk to—when a witness has testified, you should not talk to him about his testimony. It would be just the same as if you remained here and heard his testimony. The object is to let each witness be independent of the other and give testimony uninfluenced by what the other witness may have said, so that I am going to ask you then not to talk about the [55] case with each other even though now it would not ordinarily be improper for you to do that because if you did it now you would talk to the witness after you came off the witness stand so don't talk to each other about the case at all. You can talk to the lawyers about it; it is their duty to talk to you about the case and about your testimony but now, under the—because of the request, it is my duty to excuse you from the court room but when we are through you may be called in. Will this witness take up the remainder of the afternoon?

Mr. Nesbett: I believe so.

The Court: I will say to you witnesses, you may go to your homes and come back here tomorrow

(Testimony of Stuart E. Tope.)

morning at 10:00 but remain out of the court room until you are called. Is there a witness room here?

Mr. Nesbett: I believe not any more.

Bailiff: We normally provide chairs in the hallway here.

The Court: No, they won't be here this afternoon, so I will ask you to retire from the court room. And you may go to your homes if you want to and come back here tomorrow morning at 10:00 o'clock.

(The witnesses left the court room.)

Mr. Dunn: Your Honor, I have one thing I would like to mention. There is in the court room a Mr. Fred Lynn, the gentleman sitting in the first row here. Mr. Lynn is an attorney from Seattle [56] and he is interested in this case. He would like to sit in on it. It is possible that I would want to call him for a witness. If I did call him for a witness, it would be for the sole purpose of showing what monies a bonding company may have spent in connection with bills incurred by Mr. Tope.

The Court: I would be inclined to make an exception in the case of a lawyer.

Mr. Nesbett: Yes.

The Court: I don't believe a lawyer in the case ought not to be excluded from the court room even though he may be called as a witness.

Mr. Nesbett: I'd just like to ask through your Honor if Mr. Lynn does represent a bonding company or anyone directly interested in the case?

Mr. Dunn: Mr. Lynn is not an attorney of

(Testimony of Stuart E. Tope.)

record in this case. He is representing no one here. He is interested in the case.

The Court: Well then I understand Mr. Lynn may remain in the court room?

Mr. Nesbett: Yes, your Honor.

The Court: Very well.

Direct Examination

By Mr. Nesbett:

Q. Is your full name Stuart E. Tope?

A. It is [57]

Q. How long have you lived in Alaska, Mr. Tope? A. Since '49.

Q. And what has been your business since '49 in Alaska? A. Construction business.

Q. How long have you been in the construction business altogether? A. About 15 years.

Q. What particular phase of the construction business have you been engaged in in Alaska?

A. Well, mostly building.

Q. Now are you—and were you in 1953 president of a corporation known as Stuart Construction Company, Inc.? A. I was.

Q. Is that an Alaskan Corporation?

A. It is.

Q. And is that corporation still in existence?

A. It is.

Q. Have you paid the taxes and filed your statements as required by law for the Stuart Construction Company, Inc.? A. I have.

Q. Now, Mr. Tope, did you—you know Mr. Oaks,

(Testimony of Stuart E. Tope.)

do you not? A. I do.

Q. Is he in the court room now?

A. He is.

Q. Sitting by Mr. Dunn? A. He is. [58]

Q. And how long have you known him?

A. 1951.

Q. Did you have occasion in about November of 1953 to discuss working with or for him in connection with the Haines pipeline clearance job?

A. I did.

Q. Had you had any other dealings in the construction way with Mr. Oaks prior to November of '53? A. I did.

Q. What connection or dealings had you had with him?

A. He leased some cats of mine for his road job at Salano.

Q. And about when in 1953. Was that in '53?

A. That was in '53.

Q. And when in 1953 did that occur?

A. Well it was in the month of July and August, or August and September, somewhere along in there.

Q. Now, what were the first discussions you had with Mr. Oaks in November of '53 about the Haines pipeline job?

A. Well, he said that he was contemplating a—getting a contract for the clearing of the pipeline from Fairbanks to Haines and I believe I asked him, I said if I was going to get cut in on the deal, a little of the work, and he said there were possibilities.

(Testimony of Stuart E. Tope.)

Q. Did you have any other discussions after that one you just recounted? [59]

A. In regards to the pipeline?

Q. Yes, sir.

A. Yes, he told me that he had some cats that weren't in shape to go on a pipeline and he'd like to use mine.

Q. Did he make any proposed use or promise as to how he was to use those cats?

A. Well he asked me to lease them to him at first and I said "no," I wouldn't lease them to him.

Q. And what if anything did Mr. Oaks say then?

A. Well, Mr. Oaks said, well he said "well, maybe we can work up a contract."

Q. Was that in approximately November of '53?

A. Yes.

Q. Did you have, subsequently, talks with him, which resulted in entering into a written contract?

A. Yes, but he wanted a bond and I told him I didn't know whether I could get a bond. I didn't think I could because I had no money.

Mr. Dunn: Your Honor, I object to that as being irrelevant, which, about the only objection I have now in the light of a local ruling to the effect that only counsel who asks the question can object to it as being non-responsive, the answer; the answer was not responsive.

The Court: I thought it was. You may be right. He asked if there was a bond.

Mr. Dunn: He didn't ask him anything about

(Testimony of Stuart E. Tope.)

the bond, [60] your Honor. Will you read the question, please.

(The reporter read the question, Lines 13 and 14, previous page.)

The Court: Now that is all. Did you make no inquiry about the bond?

Mr. Nesbett: I didn't specifically inquire.

The Court: Counsel objected on the grounds it wasn't responsive and of course if that isn't true, made no inquiry about it, the last part was not responsive.

Mr. Nesbett: I think he had reference to a local ruling that is followed here that he himself couldn't object if the answer was not responsive. I have never seen the sense in the ruling anyway so I will abide by your Honor's ruling and go ahead.

The Court: I simply understand he objected on the grounds it is not responsive. You say you have a rule here?

Mr. Nesbett: The only attorney that could object if the answer is non-responsive is the attorney who asked it, and I say I have never seen the sense of it, and I will withdraw the question or permit the answer to be stricken, and I will keep going.

The Court: Very well.

Mr. Dunn: Your Honor, may we proceed with the trial of this law suit without the burden of that local rule that only the attorney who asks the question can object to it on the grounds of not being

(Testimony of Stuart E. Tope.)

responsive. Mr. Nesbett and I agree; neither of us have ever seen any sense to the rule.

The Court: And I believe the rule is as far as that law [61] is concerned that the national—federal government law prevails and this is a matter of a knowledge of objective law. We are bound by substantive law of the territory but the procedure law is defined by the federal government, by the procedure in the federal court, so I think that that would not be the rule, and I will proceed to prevail over the local procedure.

Q. (By Mr. Nesbett): Mr. Tope, do you recognize this document that I am handing you?

The Court: Is that the contract?

Mr. Nesbett: Yes, your Honor.

The Court: December 17th?

Mr. Nesbett: Yes, sir.

A. Yes, sir.

Q. What is it? A. It is a contract.

Q. Is it a copy of the contract of December 17th that has been referred to here by counsel for both sides? A. Yes.

Q. Did you sign that copy that you have in your hands on the last page? A. Yes, sir.

Q. And was it signed by Mr. Oaks on behalf of Oaks Construction Company?

A. Yes, sir. Yes it was.

Mr. Nesbett: And, your Honor, I would like to offer this [62] copy, or the copy that is attached to the complaint.

(Testimony of Stuart E. Tope.)

The Court: Well you better offer that one. These are always dim.

Mr. Nesbett: Yes, sir.

The Court: So as to identify that, we might mark it later but it will be Plaintiff's Exhibit 1 for the plaintiff. 1. Plaintiff's Exhibit 1. What do you say about it Mr. Dunn?

Mr. Dunn: I think I am going to okay it, your Honor, if you will just give me a second please.

The Court: Very well.

Mr. Dunn: I have no objection, your Honor.

Mr. Nesbett: If the Court please——

The Court: Yes, sir.

Mr. Dunn: Now that the signed contract—is it your Honor's ruling that that is now admitted?

The Court: Yes, I would. Two grounds: First, you make no objection and second, I think it is competent evidence. Both sides agree there was a contract.

Mr. Dunn: Yes, your Honor. Now that that contract has been admitted into evidence in the matter, I take it, of the right of Stuart Construction Company, Inc., as being processed towards proof, its right to recover being processed towards proof, after Mr. Nesbett has examined this instrument, I'd like to present it to the Court for two purposes, one tending to impeach the testimony of the witness as already given, and the other, to show the lack of right of [63] Stuart Construction Company, Inc., to present a claim in this court.

The Court: Well, what is your point?

(Testimony of Stuart E. Tope.)

Mr. Dunn: You will see it in one second, your Honor. Mr. Nesbett is examining the instrument.

Mr. Nesbett: Well, I don't quite get at what he has got in mind but I think it is a wrong time to bring it up in any event. Apparently he has a certificate from the director of finance of the territory showing that an annual report was made at a late date and that corporation taxes were paid at a late date for Stuart Construction Company, Inc., and contends as a result that the corporation has no right to recover, or no standing in the court to maintain a suit. Now, whatever merit there is to that claim, I say, it has been brought up at the wrong point in the law suit.

The Court: Sometime along the line; probably it is premature now, if he has no right to recovery, counsel has a right to show that whether in his case or cross-examination here. The contract apparently was signed by Oaks Construction Company by Mr. Oaks and by the Stuart Construction Company by Mr.—by the plaintiff—by the witness, so that both sides recognize that there were two corporations in the contract. Now then, if it has lost its authority and lost its identity, and integrity as a corporation, of course counsel has a right to show that and not be entitled to recovery. In other words, it couldn't contain a suit.

Mr. Nesbett: My only contention is this is not the proper time to attempt to show it. [64]

The Court: That will be my ruling at this time.

(Testimony of Stuart E. Tope.)

Mr. Dunn: It is immaterial to me, your Honor. My thinking is this, that——

The Court: It would save a lot of time if it was not contained, maintain the action, if we knew it now.

Mr. Dunn: That is what I was thinking. If any point is valid the sooner we get it in, the more time we save.

Mr. Nesbett: I don't know if your Honor understood me entirely in my opening statement but I am not trying to recover anything in this case except on behalf of Stuart E. Tope, as an individual, for the reasonable rental value of equipment of his that was used up on that pipeline. That is my only claim here.

Mr. Dunn: Now, will your Honor give me the summary judgment that I asked for?

The Court: That is on the first count?

Mr. Dunn: Yes, sir.

The Court: Well as I understand from you, you are not seeking to claim anything——

Mr. Nesbett: There is only one other possibility when he made the motion that occurred to me, and that is that Stuart Construction Company, Inc., might be entitled to a claim for quantum meruit also and that of course is something that your Honor will have to decide after the case is over, as far as I can see.

Mr. Dunn: Well, your Honor, the only thing I can do there of course is what any attorney would do and scream "surprise" [65] at the top of my

(Testimony of Stuart E. Tope.)

voice, not in the pleadings, wholly outside of the scope, and I am not prepared to defend against such claim.

Mr. Nesbett: Well, your Honor, now I don't think counsel is at all surprised; if he looked at the contract he would see that the total amount that could be earned under the contract could be, would be approximately \$30,000 plus any overage for the \$25.00 for eight hours for the use of cats. We ask for \$53,000.00 in either event and on the ground that we feel that he is entitled to that less proper deductions.

The Court: I understood from you, from your last statement there that your theory here is that Mr. Tope would only be entitled to recover under quantum meruit and that the Stuart Construction Company's case was really out, that you are not going to make any claim on its behalf?

Mr. Nesbett: Only in the event that it might turn out that at the time all the proof on both sides is in that Stuart Construction Company, Inc., itself might be entitled to a quantum meruit claim instead of Stuart E. Tope. That is the only reason I rely on the first cause of action.

The Court: I see.

Mr. Dunn: If the Court please, as I understand Mr. Nesbett, he is saying, he now admits there is no cause of action existing to favor Stuart Construction Company?

The Court: As alleged here?

Mr. Dunn: That perhaps later on, a cause of

(Testimony of Stuart E. Tope.)

action in [66] favor of Stuart Construction Company will appear.

The Court: On a quantum meruit.

Mr. Dunn: If such appears, it will be at that time that it will be up to Mr. Nesbett to move to amend his pleadings in accordance with the proof, and that matter will then be before the Court, but with respect to the present matter before the Court, as I see it, my motion is well taken.

The Court: Well he wants to maintain the Stuart Construction Company as a party here. He doesn't want it out until he can determine whether or not it has any rights, and then I take it he——

Mr. Nesbett: That is all.

Mr. Dunn: I know he doesn't want it out, your Honor, but the only reason he gives for leaving it in is that it may develop that there is a claim and that is to be weighed against his statement that he is not now urging a claim, that the only one that he now urges this Court is quantum meruit on Stuart E. Tope. Therefore as of now, I think my motion is well taken.

The Court: No, sir. Counsel asked me to retain Stuart Construction Company in the case less it might appear later on that the right would accrue to it and I think that is very proper because I won't, wouldn't want to go through here and try a case and put counsel out of Court and then find that he had a right to come back in Court and it may be statute of limitations would run. I don't know, so I think that is a reasonable request and in the interest

(Testimony of Stuart E. Tope.)

of justice, why it may be retained with the idea that he may have to [67] amend.

Mr. Nesbett: Thank you, your Honor.

Mr. Dunn: And your Honor's ruling on this prepared certificate—would you like to see it before you rule on it?

The Court: Well that is it on the basis that Stuart Construction Company has no standing, that is as a corporation?

Mr. Dunn: Yes, sir.

The Court: No, that may be, and if it hasn't why then can't demand for a dead body; if it is dead why it is dead, and if it can't maintain an action here, it can't maintain it later on. In other words if it can't maintain an action, breach of contract, it can't maintain one for quantum meruit.

Mr. Dunn: Well your Honor indicated a moment ago that you thought this certificate might be premature but you also indicated that if my point is meritorious the sooner we got it in, the more time would be saved, and so I am not certain as to what your Honor's pleasure is with respect to the presentation of the certificate.

The Court: I think in the interest of justice and so the case develops, we better leave it as is and I understand that counsel by a statement now says he is only proceeding on the question of quantum meruit.

Mr. Nesbett: That is true, your Honor.

The Court: That would simplify the issues.

Q. (By Mr. Nesbett): [68] Mr. Tope, did you

(Testimony of Stuart E. Tope.)

discuss the matter of the furnishing of a performance and payment bond with Mr. Oaks at the time you signed that contract that you have, Exhibit 1, before you? A. Yes, I did.

Q. What was that discussion?

A. Well I told him in the first place I didn't think I could get a bond.

Q. And was that at the time you signed the contract?

A. Yes, at the time I signed this contract.

Q. What did Mr. Oaks say when you told him that? A. He said "You try to get a bond."

Q. Did you try? A. I did try.

Q. And what attempts did you make to procure a bond?

A. Well I went to two different companies here in town and they knew that I didn't have any money, and I think that that is the reason why that I didn't get a bond.

Q. Which companies did you go to?

A. Well one was Mr. Molitor's company down here. It was established here. I don't know whether he is still in town or not.

Q. And were you required to furnish financial statements in any bond applications you made?

A. Yes, you usually are.

Q. Did you try any other company?

A. There was one other company and they're out of business since [69] that time.

Q. Did you report to Mr. Oaks as to your efforts to get a bond? A. Yes, I did.

(Testimony of Stuart E. Tope.)

Q. And what was the discussion of—

A. Well he called me at various times and asked me if I had got a bond and I told him “no, I didn’t,” and then I did tell him that I was—would try Mr. Olday. He said something about going a bond for me.

Q. And about when was this now with relation to December 17, 1953?

A. Well, this was after December 17th. Mr. Oaks told me that, he says well if I couldn’t get a bond to go on up on the pipeline and go to work and we’d work it out on an hourly basis.

Q. Well now, did you attempt to see Mr. Olday before you went up to work on the job?

A. I can’t recall whether I saw—before the signing of the contract—I saw him after that.

Q. All right. What was the result of your efforts to get Mr. Olday interested in the bond?

A. Well he said that he was going to go outside and that when he had come back in why he would see what he could do.

Q. Now about when—what time of the month, and which year, was that?

A. That was in 1953 in December, I believe.

Q. Well did Mr. Olday come back from his trip outside?

The Court: Mr. who? [70]

Q. Olday. Did you contact him when he came back from his trip outside? A. Yes, I did.

Q. And what was the result of that contact—contact as far as the performance bond was concerned?

(Testimony of Stuart E. Tope.)

A. Well I think he called Mr. Oaks and then I think he went to Molitor's.

Mr. Dunn: Object, as hearsay.

The Court: Of course he couldn't. He says he thinks he called him; he couldn't tell what was said about that.

Q. What was the result? Did you get a bond?

A. No, I didn't.

Q. Did you advise Mr. Oaks that you were unable to get a bond from Mr. Olday?

A. Yes, sir.

Q. Did Mr. Oaks give you any instruction or make any statement when so advised?

A. No, he didn't.

Q. Were you in Anchorage at the time that you advised Mr. Oaks?

A. I believe I was up on the pipeline at the time, at the Tok Lodge.

Q. Did Mr. Oaks give you any instructions—

A. Well he said to keep trying.

Q. Was there any discussion had about your discontinuing work or what your status was on the line? [71]

A. No, he didn't.

Q. Now, did you have any discussion with Mr. Oaks prior to going up to work on the job that you were to be put on his payroll?

A. Yes, I did.

Q. Tell the Judge what that discussion was?

A. I told him that I needed some money and I didn't have any to live on, and to go up the road with this equipment, and he said "Well, we'll put

(Testimony of Stuart E. Tope.)

you on the payroll at \$250.00 a week and you'll be acting as foreman."

Q. And did Mr. Oaks do that?

A. Yes, he did. He advanced me one check before Christmas.

Q. Now, where was your equipment at the time you entered into this contract?

A. One piece was in Mr. Oaks' yard here, the terminal yards, and the other piece was at Tonsina.

Q. Where is Tonsina?

A. Tonsina is below Copper Center about twenty miles.

Q. And with relation to Tok Junction, how far is it from Tok?

A. Well I'd say in the neighborhood of 106 miles.

The Court: Is that T-o-p-e Junction?

Mr. Nesbett: T-o-k.

The Court: You told me that once.

Mr. Nesbett: T-o-p-e is the witness.

The Court: Yes. That is right.

Q. Now, did you have any—what other equipment were you to use on [72] that job?

A. Well I was to use three cats.

Q. What type caterpillars were they?

A. D-8's. 8 R series.

Q. And were those your caterpillars?

A. Yes they were.

Q. Had you purchased them in the Alaska area?

A. Yes, sir, in Fairbanks.

Q. From whom did you purchase them?

(Testimony of Stuart E. Tope.)

A. The Northern Commercial Company.

Q. Were those caterpillars entirely paid for at the time you entered into this written contract with Mr. Oaks? A. No, they weren't.

Q. Had you purchased them under rental, written agreements with Northern Commercial Company?

A. They call it a rental purchase contract.

Q. Do you recognize these documents that I am handing you? A. Yes, I do.

Q. What are they?

A. They're rental purchase contracts.

Q. And what particular equipment does each contract cover? State it briefly.

A. One, three cats, and a 2½ ton truck.

Q. Were you making payments to Northern Commercial Company on all of those purchase agreements? [73] A. Yes.

Q. In December of 1953?

A. I didn't make the last payment in '53. No, I didn't have to. I think the last payment was made in November, I believe, or thereabouts—October or November.

Mr. Dunn: Your Honor, I object to this testimony and move to strike it. I don't see the relevancy of it. If Mr. Tope is, as I understand him to be, claiming merely on the basis of quantum meruit, the value of work done, I don't see the relevancy of whether or not he paid any payment to the Northern Commercial Company on these cats.

The Court: I think it would. Quantum meruit

(Testimony of Stuart E. Tope.)

claim would be for the use of these cats, I take it. Now, then, counsel has offered the contract for the cats and asked him about the payments because that would have an influence upon the question of his title.

Mr. Nesbett: The question is what, sir?

The Court: Question of his title, and whether or not they were taken—I understood they were taken away from him. I think title permits you to reserve the right to renew your motion later on.

Mr. Nesbett: I want to offer these in evidence so I won't delay the Court and ask counsel to look over them and I will continue to question him. Mr. Dunn would like to look them over without my continuing to question the witness and I would like to offer them in evidence, and in order not to delay the hearing, I will try [74] and do that after hours or tomorrow with Mr. Dunn, or let him some other time.

The Court: Very well. Will you proceed with the examination.

Q. (By Mr. Nesbett): Mr. Tope, approximately when did you commence work on the Haines pipeline clearing?

A. On the turning, it was started around the 3rd of January.

Q. Were all three of your caterpillars in the area of Tok Junction at the time you commenced work?

A. They were on the line at that time.

Q. Did you have any other equipment there at that time?

(Testimony of Stuart E. Tope.)

A. I had the 2½ ton truck and one pickup.

Q. What type truck was that?

A. It's a 2½ ton Dodge, cab over.

Q. How long had you had that piece of equipment?

A. It was brand new.

Q. And when did you buy it approximately?

A. Sometime in December. I bought it for the pipeline itself.

Q. And from whom did you purchase it?

A. I purchased that from the NC Company on a rental purchase.

The Court: Is that the pickup truck you are talking about?

Mr. Nesbett: 2½ ton fuel tanker.

Q. Did that truck have a fuel tank on it? [75]

A. It had a 500 gallon fuel tank on it.

Q. And what other equipment if any did you have on that job at that time?

A. Oh I—I had the three tractors and the 2½ ton truck and pickup, and I think it was just a week or so after that that I purchased this station wagon. I just can't remember the exact date on it.

Q. What type pickup did you have on the job?

A. Half ton GMC.

Q. Now, did you purchase the station wagon for use on that particular—

A. Yes, I did.

Q. Where did you buy that?

A. Fairbanks.

Q. And now at the time you commenced work in

(Testimony of Stuart E. Tope.)

January of 1954 were there any employees there to run this equipment?

A. They were put there by Mr. Oaks' request.

Mr. Dunn: Objection, your Honor. Same. It is not responsive.

The Court: It isn't. You asked him one question and he answered another. Whether he had any employees on the job.

Q. Were there any employees there to run that equipment? A. Yes, there was.

Q. How many were there? A. Three. [76]

Q. And did you employ any of those people?

A. No, I didn't.

Q. Who did employ them? A. Mr. Oaks.

Q. Who were the employees that were there at the time you commenced work on January 3rd?

A. Well there was a fellow by the name of Morgan and a man by the name of Wilcox, and I can't recall the other man's name.

Q. And did Mr. Oaks employ all three of those men? A. Yes.

Q. Now, was there any other Oaks' employee there on that particular section of the pipeline?

A. Mr. Hager.

Q. And do you know what title he had?

A. He was running the spread, I guess.

Q. What is a spread in the terminology—

A. That is this particular section of the clearing.

Q. Well now, did you know if he had a title with Oaks Construction Company?

A. Well I believe—I don't know whether it

(Testimony of Stuart E. Tope.)

would be a general foreman; that would be about the only thing he could be.

Mr. Dunn: Objection, your Honor, the witness says he don't know and then he continues to answer.

The Court: Objection sustained. He said he didn't know. You are asking about Mr. Hager, is that right? [77]

A. Hager.

The Court: Yes.

Mr. Nesbett: Well if you don't know say you don't know and let it go at that, Mr. Tope. Apparently that will take care of it.

Q. Now, what did Mr. Hager do then around that area? A. He bossed the job.

Q. What do you mean by bossing the job?

A. Well he run the cats and run me and that was it.

Q. Did you attempt yourself to boss the cats and run the job?

A. I tried but it didn't go any good.

Q. In what respect did you try?

A. I was overruled.

Q. Well, how long had you been on the job before you were overruled?

A. Oh not more than a week or two.

Q. And will you tell the Court the first instance of your being overruled?

A. Well I had a sort of a run-in with Mr. Hager and we kind of went to bat, and he ordered the cats back on the berm and started telling them to block the berm down. Then Mr. Oaks came along. I

(Testimony of Stuart E. Tope.)

imagine there was a telephone conversation, but he arrived the next day and——

Q. Who arrived the next day?

A. Mr. Oaks, and he cornered me and told me, he said, “Mr. Hager’s [78] running this end and whatever he says goes. That is it.”

Q. Did you argue with Mr. Oaks about that statement? A. No use of arguing.

Q. Did you tell him that you had signed——

Mr. Dunn: Objection to that last answer, your Honor. Not responsive.

The Court: It may be disregarded, that is that there is no use in arguing.

Q. Did you try to argue with him about that statement? A. Yes, in a way; yes I did.

Q. What did you say?

A. Well I just—I wanted to plow right ahead on it and I was delayed. That is all, and I didn’t think I was getting a fair shake.

Mr. Dunn: Same objection, your Honor.

The Court: Objection sustained. Expression of an opinion.

Q. Can you explain to the Court what a berm is?

A. Well it is a—after they clear it they push it into a pile, a long straight pile.

Q. And is a berm then a pile?

A. Yes. It is debris that they scrape off the top of the ground, trees, bushes, and what have you. They put it over to one side into a berm.

Q. How much footage on each side of that right of way were you supposed to clear?

(Testimony of Stuart E. Tope.)

A. You were supposed to clear a 50' strip with a 30' clean right [79] of way.

Q. And how would you clear that, by seraping the trees and brush to one side?

A. That's right.

Q. Would the berm then be the brush that laid along the line? A. Yes.

Q. What was the nature of this disagreement you had with Hager over the berm?

A. Well we tried—it was almost impossible to get up on top of that stuff and block walk it down.

Q. Get up on top of what stuff?

A. On top of the berm.

Q. After you had scraped it in a pile?

A. Yes.

Q. Why was it impossible?

A. There was snow and trees and they specified, I think, that you had to get it within 18" of the ground and it was just an impossibility.

Q. Why was it impossible?

A. There was too much berm, too much snow.

Q. Well what was the essence or nature of the disagreement you had with Hager?

A. That was it, over this berm, of walking it down.

Q. What did you want to do about it?

A. I wanted to keep on going ahead with it. [80]

Q. Weren't you going to walk it down?

A. A little later on after the snow melted, yes, I would say you could do it.

Q. Let me finish the question before you start

(Testimony of Stuart E. Tope.)

answering it, will you. Now, then, is that when Mr. Oaks was called in to settle this argument?

A. Yes, I believe he was.

Q. All right. Now, did you at any time attempt to hire any employees to run those cats after you started your work up there on January 3rd?

A. Yes, I did.

Q. And whom did you attempt to employ?

A. Mr. Harlan.

Q. And when did that occur?

A. About a week after the job started.

Q. And tell what happened with respect to your attempt to hire Mr. Harlan?

A. Well, there was one of the men in there that wasn't capable and Mr. Hager fired him.

Mr. Dunn: Move to strike it, your Honor, that is an opinion.

The Court: That is one man is not capable. He can say he was fired but if he expresses an opinion then unless it was said by the defendant as the reason, as to the reason why he fired him.

Mr. Nesbett: Would it be greatly objectionable if he [81] stated his opinion in that respect, your Honor. If it is, I don't mind striking it.

The Court: Well if he can tell what the facts are.

Q. What happened then when you attempted to hire Harlan? Just state the facts surrounding it.

A. Well, after this man was off the cats I told Hager, I said "there is a man down there for it, Spot Harlan, that was a good man, very capable,

(Testimony of Stuart E. Tope.)

been up here a good many years," and he says, "You are not hiring no one."

Q. Did you attempt nevertheless to hire Harlan?

A. Yes, I did.

Q. And what happened?

A. They told me that he wouldn't be put on the pipeline.

Mr. Dunn: Objection, your Honor, it is hearsay.

The Court: Well if it was done by someone under the defendant, then it would not be hearsay because it would be coming from the defendant himself.

Mr. Dunn: True, but no such foundation has been laid, sir.

The Court: Well I think up to this time it appears from the evidence that Mr. Hager was a representative of the defendant, worked for the defendant, boss there he said. He was the boss and had charge and full authority there and if he did, why whatever he said would be binding on the defendant.

Mr. Dunn: If he is quoting Hager that would be fine, but I don't know who he is quoting. [82]

The Court: I thought he was; maybe not. This conversation, was it with Mr. Hager?

A. Yes, it was Mr. Hager.

The Court: I thought it was.

Q. Was there a Mr. Crawford connected with that pipeline?

A. He was the general superintendent.

Q. By whom was he employed?

A. By Oaks Construction Company.

(Testimony of Stuart E. Tope.)

Q. Did you ever have occasion to deal with Mr. Crawford? A. Occasionally, yes.

Q. Did you have occasion to talk or discuss the matter of employing Harlan with Mr. Crawford?

A. Yes, I did.

Q. And what was that discussion and what happened?

A. Mr. Crawford said that if there is any hiring to be done, we'll do it.

Q. Now, Mr. Tope, will you describe to the Court generally the type weather and range of temperatures that existed in the area of Tok Junction in the month of January of 1954?

A. The weather would range from 25 below to 67 below.

Q. And were your operations in connection with clearance of the pipeline hampered in any fashion by those kind of temperatures?

A. Yes, it was.

Q. And in what way?

A. Well the extreme cold weather has a tendency to make steel very [83] fracionable, and going over rocky objects, and like that, why it would snap the pads off. I have a one housing. I think I had one housing broken by cold weather.

Q. Were you delayed from doing any work or prevented from doing any work at all for any period of time? A. Yes, I was.

Q. For how long?

A. About, oh, a little better than a week. It was just too cold. They couldn't work when we kept it,

(Testimony of Stuart E. Tope.)

and we kept the cats running twenty-four hours a day for a whole week.

Q. Just kept the engines running?

A. Yes.

Q. But not operating? A. No.

Q. Well now, as you progressed, with your clearance, from Tok Junction toward Big Delta, did you run into any unusual conditions along the right of way? A. Yes, I did.

Q. And will you tell the Court what they were?

A. Very rocky area.

Q. Where was that area?

A. That was at Cathedral Bluff.

Q. And how far was that from Tok?

A. About 12 miles—12 to 14 miles.

Q. What was the nature of that area? [84]

A. Extremely rocky, in very large rocks.

Q. Was there much snow on the ground at that time? A. About four feet.

Q. Well did you have difficulty in that area with your equipment? A. Yes, I did.

Q. Tell the Court what difficulties you had and what happened?

A. Well it was just—when you'd run up against one of these rocks buried in the snow, why it was you'd break something on it like pads. I was always replacing pads on them.

Q. What is a pad?

A. It is a growser on the track of a cat.

Q. All right. Go ahead. Did you have any other difficulties?

(Testimony of Stuart E. Tope.)

A. Then I had one motor blow up on me; a rod went through the side of the motor block.

Q. And did you have any discussion then with Hager and Crawford concerning leaving the particular rocky area and moving to the other end of your clearance line? A. Yes, I did.

Q. And approximately how long after you commenced your work did this conversation or these conversations occur?

A. Would you repeat that please?

Q. About how long after you commenced work on the pipeline did you have these conversations about moving to the other end?

A. Well, possibly three weeks.

Q. And with whom? [85]

A. I had them with Mr. Hager. I asked them to move to an area that was out of Big Delta that was much easier to do and there wasn't rocky——

Q. Did you give him your reasons, why would you want to move? What were your plans?

A. Well it was easier to work and I would get out of that rock pile. I was just knocking my cats to pieces so it was an easier area and I wanted to move up to the easier area and he refused to let me go.

Q. Well were you going to leave the particular area, the rocks?

A. Yes, and come back later.

Q. Come back when?

A. Well, after I would start back the opposite way, just change my location. When the snow is

(Testimony of Stuart E. Tope.)

melted and it was easier to do why then I could have gone through that.

Q. What did Mr. Hager say when you made such request?

A. He says, "You won't move out of this place. You're staying right here."

Q. Did you discuss the same proposition with Mr. Crawford? A. Yes, I did.

Q. And where did those discussions take place?

A. Over the phone.

Q. Where was Mr. Crawford?

A. In Fairbanks.

Q. Did you ever discuss the same matter with Mr. Crawford at the [86] Lodge?

A. I believe he was there at one time and I discussed it with him. I couldn't swear to that.

Q. Did you discuss it with Hager at the Lodge?

A. Yes. I discussed it with Hager at the Lodge, various times.

Q. What did Crawford say about moving out of the rocky area?

A. He said, "You won't move."

Mr. Dunn: Object, your Honor, unless he is—he is relating a telephone conversation now and I believe he'll have to assume that this conversation took place. He is going to have to lay the ground work for identifying the person on the other end of the phone.

The Court: That is that he knew his voice, and——

(Testimony of Stuart E. Tope.)

Mr. Dunn: Either that or he called him at the office.

The Court: Yes. Any of those.

Q. How did you know?

The Court: Was this a telephone conversation?

A. Yes.

The Court: Very well. I think counsel is right, that of course he might have been talking to somebody else.

Q. Mr. Tope, how did you know you were talking to Crawford on the telephone?

A. I called him at his apartment.

Q. Have you ever called him there before?

A. Yes, I have. [87]

Q. Did you know his voice?

A. Yes, I would.

Q. Did the voice you were talking to on that occasion you refer to appear to be Mr. Crawford or sound like Mr. Crawford? A. Yes.

Q. Are you sure it was Mr. Crawford?

A. Only by voice.

Q. Did he discuss the matter intelligently with you as though you had contacted the person that you called? A. Yes.

Q. And what did he say?

A. He said that——

Mr. Dunn: Same objection, your Honor.

A. "You just can't move from up there."

The Court: You say you do object?

Mr. Dunn: Same objection.

The Court: The objection will be overruled.

(Testimony of Stuart E. Tope.)

Q. Now, Mr. Tope, had you had any discussion with Mr. Oaks prior to going up on the job about the payroll for the men who were running your equipment?

A. Yes, I did.

Q. And what discussions were had?

A. I—Mr. Oaks, I told him, I said “I haven’t any money,” and he says “Well, I’ll make the payroll.”

Q. Did you discuss the matter of insurance, workmen’s compensation [88] insurance?

A. I did not.

Q. Did he ever bring the subject up himself?

A. I don’t believe so.

Q. Was there ever any agreement one way or the other as to who was taking care of the matter of insurance, as set out or required in the contract?

A. None at all.

Q. Did you carry any insurance?

A. No, I didn’t.

Q. Mr. Tope, what particular work did you do around the clearance work that was going on?

A. Well, I’d help drive the truck and get it over there and help get the cats greased. I’d chase parts up in Fairbanks.

Q. How far was it to Fairbanks from your scene of operation?

A. About a little better than 200 miles.

Q. And were there any parts available any closer than Fairbanks for those caterpillars?

A. No.

(Testimony of Stuart E. Tope.)

Q. Where would you buy the parts in Fairbanks?

A. At the Northern Commercial Company.

Q. And did you pay cash for them or what were the purchase arrangements?

A. It was put on an open account.

Q. Whose open account? [89]

A. Stuart Tope.

Q. Now, what else did you do in connection with the clearance job?

A. I'd tinker with the cats.

Q. Were you able to repair the cat that you mentioned had the first engine trouble?

A. No, I wasn't.

Q. And about when did that occur?

A. Well it—sometime in February.

Q. Did you ever during the time you were on that clearance job attempt to hire this man Harlan again?

A. Yes, I did.

Q. And what was the occasion and about when did you make such an attempt?

A. Well, it was one of the cats had a broken piston and I told him why don't you go up there and fix that cat and he says, "Okay, I'll see," he says, "Who is going to pay me?" and I said "Oaks," and I says "Make your time cards out and I'll turn them into Hager," and which I did.

Q. Where did Mr. Harlan work on the cat?

A. It was out along just before you got to the Cathedral, and——

Q. Is Cathedral the area that you refer to as

(Testimony of Stuart E. Tope.)

being rocky? A. Yes.

Q. And it was extremely cold? You recall the temperature?

A. I would say it was around 40 to 50.

Q. Where did Mr. Harlan have to work on it? [90] A. Right out in the open.

Q. Did he perform the work?

A. Yes, he did.

Q. How long did it take him?

A. About a week.

Q. Did you turn in time cards for him?

A. Yes, I did.

Mr. Dunn: Your Honor, I object again. I was bearing with it for a while but this is—that Latin phrase you used, it is irrelevant.

The Court: Well.

Mr. Dunn: That is as to how cold it was and how poor Mr. Harlan worked a week out in the cold fixing the cat.

The Court: Of course that is important, the question of wages. That is all there is to it but this is just an occasion of trouble, I understand. The machinery was breaking because of the extremely cold weather and the problem he had and the work he had to do in the very cold weather to repair the cat.

Mr. Dunn: If I understand it, the claim that is being asserted here, correctly, and apparently I don't, the only relevant thing would be how many hours these cats worked.

The Court: Well the question here is—there is

(Testimony of Stuart E. Tope.)

a question here; counsel says he is suing on a quantum meruit. The question here is whether or not the contract although apparently in force yet by the operation was abandoned and he says he tried to [91] hire Harlan and I take it they hired him, and he worked for a week and was not paid by Mr. Oaks.

Mr. Nesbett: If counsel wants to stipulate that there never was any contract in effect why we can shorten the trial considerably.

The Court: Well, apparently it was observed in part and disregarded in part. At least that is the way it appears. Anyway the Harlan worked for a week and asked how cold it was, that is not important. He worked for a week and now what about his wages.

Q. Did you turn in time cards for him? I believe was the last question. A. Yes, I did.

Q. To whom? A. Mr. Hager.

Q. And do you know yourself whether Harlan ever was paid for this second bit of work that he performed? A. I don't believe so.

Q. Now, did you ever attempt to hire Harlan on any other occasion while you were on that area of the pipeline? A. Yes, I did.

Q. And what was that occasion and what for, what purpose?

A. Well it was—Mr. Hager had fired one of the men and we used him for—a couple of days to run one of the cats.

Q. And was that his only employment?

(Testimony of Stuart E. Tope.)

A. Well he was later hired at the other end. [92]

Q. But I mean prior to, I mean who hired him at the other end, do you know?

A. I believe that Mr. Crawford hired him.

The Court: Was Mr. Harlan, I understand, was fired at this——

A. He just worked a couple of days but he knew he was going to get paid for it. He just helped out until they got a replacement.

Q. Where did Mr. Harlan live?

A. He lived at the Tok Lodge.

Q. He was available around the job——

A. We lived at the Tok Lodge.

Q. Now, was Mr. Hager ever replaced on that job during the time you were there?

A. Yes, he was.

Q. And approximately how long after you had commenced work was it that Mr. Hager was replaced? A. Six weeks to two months.

Q. By whom was he replaced?

A. By Mr. Abbott.

Q. And do you know yourself who employed Mr. Abbott? A. I do not, no.

Q. Did you ever have a discussion with any other partner of the Oaks Construction Company concerning Mr. Abbott's employment?

A. Yes, I talked to Mr. Noonan.

Q. And was Noonan, Mr. Noonan, one of the partners of Oaks Construction [93] Company?

A. Yes, he was.

(Testimony of Stuart E. Tope.)

Q. Where did you talk to Mr. Noonan and approximately when?

A. In his apartment in Fairbanks.

Q. And approximately when? Did you say Mr. Hager left about six weeks?

A. To two months.

Q. After you had commenced, he had commenced work? A. That is right.

Q. When was, with relation to the time Mr. Hager left, did you talk with Mr. Noonan?

A. I just can't tell you.

Q. Was it before Mr. Hager left?

A. I believe it was.

Q. What discussion did you have with Mr. Noonan about Mr. Abbott?

Mr. Dunn: Objection, your Honor. We got a touchy one here.

The Court: You have got what?

Mr. Dunn: This is a touchy point of evidence. At least it is so as far as I am concerned. As your Honor knows, the whole basis of the rule against admission of hearsay, or one of the main reasons for it, it denies counsel the right to cross-examine. Now, the—however, testimony of a party is admitted freely. It is either advantageous or disadvantageous, either an admission against interest, are self-serving, but now here we have two dead parties. [94]

The Court: Is Noonan dead?

Mr. Dunn: Yes.

The Court: He was a partner, I understand, and of course if he spoke to the other fellows, I think

(Testimony of Stuart E. Tope.)

the dead man's rule would not apply on that situation.

Mr. Dunn: Well the dead man's rule admits the testimony but that is limited to an action against the executor or personal representative, at least under our Alaskan statute it is, and I do not believe that testimony is admissible here.

The Court: Where you mean where there is a dead partner his testimony is not admissible if he made some statement with reference to the partnership?

Mr. Dunn: That is my contention, your Honor, and under our Alaskan statute I guess it is commonly called "dead man's statute" it is to the effect that in an action against a personal representative even an executor or administrator; I imagine it is a common one throughout a number of jurisdictions. I don't know. I practiced only here but when you are suing an executor, the declarations of the deceased are admissible, but that is the only place so far as I know that our statutes mention a declaration of a deceased; no exception is made for.

The Court: That is a case for personal representative here, a statement here, suit against a partnership, and admission was made, if you can recall it, that, by one of the partners who is deceased.

Mr. Dunn: That is what they're attempting to show but our [95] statute says you can show these admissions of a dead person when you sue his representative.

(Testimony of Stuart E. Tope.)

The Court: Well of course that is where the action is against the dead man.

Mr. Dunn: And it stops there?

The Court: Yes.

Mr. Dunn: And that throws you, according to my reasoning, into the rule that it mentions that one excludes the other, includes the other.

The Court: The courts uniformly held. I don't want to put it too strongly. Then what you and I are calling a dead man's statute that dead man may bind where he acted for somebody else, and in this case, he was acting for the partnership, and not for himself. In other words he is not sued here but the partnership was sued, of which he was a partner. Now the question is and of course there is no question, but that he had bound the partnership now that he is dead, whether or not what he said after he was dead would bind the partnership, and that it is not only binding but whether or not what he may have said in his lifetime could be elicited and brought out before the Court.

Mr. Dunn: That is the point. There is no question but what Noonan could bind the partnership in the ordinary course of his business but the question is whether or not what Noonan said to that end is now admissible in the light of the dead man's statute, and the principle behind the hearsay rule. This clearly [96] deducts the hearsay rule. There is no way in the world, at least nobody has found it yet, to cross Mr. Noonan. He can say whatever he wants to say.

(Testimony of Stuart E. Tope.)

The Court: That will be my ruling, Mr. Dunn, at this time. I will take occasion to examine the statute. It is my judgment that the dead man's statute of the Territory is such substantive law as to binding upon us. At the present time there is no jury here. I'll admit the testimony and then if it appears that I made a mistake, you can ask to be stricken out and I, myself, will examine the statute. I am eager to see what provision is made in the statute to what we call the dead man's—that is what the dead man statute is here.

Q. Did you have a discussion with Mr. Noonan in Fairbanks then in his hotel room? Was that your testimony? A. Yes.

Q. Was—who else was present at that discussion?

A. Mr. Crawford was there at one time that I was there.

Q. And was that the occasion that Mr. Abbott was employed to come down to that section of the pipeline and work?

A. Mr. Noonan said that Hager was going to be replaced by Mr. Abbott.

The Court: Now, at the disposition of the dead man statute question here was that said in the presence of Mr. Crawford?

Q. Was Mr. Crawford present?

A. I couldn't say whether he was there at that time or not. [97]

Mr. Nesbett: This is really not important enough to take a lot of the Court's time on. If there is any

(Testimony of Stuart E. Tope.)

doubt in your Honor's mind about it, it appears to me the dead man's statute Mr. Dunn refers to has nothing whatever to do.

The Court: That is my notion now, that it doesn't but of course we are bound. I think that is not the procedure; sometimes the procedural act has the force of a substantive law; that is true of trying under the laws of Illinois now. It is substantive law the courts have said and not a procedural matter, so I think that where the courts have divided the competency of witnesses—I mean where the legislature has the competency of a witness, I think that is a matter of substantive law and as I said, I think we should go on, that is if you want to go on with it, and if later on it appears that we made a mistake, why we can correct it.

Q. Mr. Tope, did you continue to work on the pipeline after Mr. Abbott had replaced Mr. Hager?

A. Yes, I did.

Q. And did you perform—what duties did you perform? Was there any change in your routine?

A. None.

Q. Did Mr. Abbott run the job in the same fashion Mr. Hager had? A. Yes, he did.

Q. And how long was Mr. Abbott there?

A. Until the completion.

Q. Was he there as long as you were on the job? [98] A. Yes, he was.

Q. And subsequently too? A. Yes.

Q. Were you able or rather, I'll ask you this: Did Mr. Abbott direct the drivers of the caterpillars,

(Testimony of Stuart E. Tope.)

your caterpillars that were working there in the clearing? A. Yes, he did.

Q. Were you able to direct the men yourself or did you attempt after your——

A. I didn't make no attempt, no.

Q. Now, Mr. Tope, after your first caterpillar—I believe you said the first one became or was broken down in February of 1954. Was that cat ever replaced by any other cat that you owned?

A. No.

Q. Was any other caterpillar brought in on the job to your knowledge? A. Yes, there was.

Q. And do you know which come, or who owned that caterpillar and who caused it to be brought in on the job?

A. Well there was one brought in from Mr. Oaks and one brought in from Rogers and Babler Construction Company.

Q. And did Mr. Oaks or Mr. Crawford or Mr. Abbott consult you about bringing the cat in say from Rogers-Babler Construction Company?

A. He did not. [99]

Q. When did you learn that such a cat had been brought to the job? A. Saw it on the job.

Q. And did Mr. Oaks consult with you about bringing one of his cats in?

A. No, he did not.

Q. When did you learn that that had occurred?

A. I saw it come up the road and saw them unloading it.

(Testimony of Stuart E. Tope.)

Q. Now, during the time you were on that clearing job, were any other cats brought in to work on the clearing? A. Yes, there was.

Q. How many and if you know who furnished them?

A. There was three and they were furnished by McLaughlin.

Q. McLaughlin Construction Company?

A. Construction Company, Inc., I guess.

Q. And were you consulted by Mr. Oaks or Mr. Abbott or anyone connected with Oaks Construction Company about those cats being brought in?

A. No, I wasn't.

Q. When did you first learn that they had brought them in?

A. Well they said they were going to bring them in and they did.

Mr. Dunn: Your Honor, it seems to me that that, this is indicative of—difficulty in leaving these causes of action dangling here, when he claims that he is interested in asserting only the cause of action of quantum meruit. If he has asserted and trying to prove only quantum meruit, then if there were a hundred other cats on that job, it is immaterial to this law suit. [100]

The Court: Well I think that counsel's effort is to get away from this contract, and that is the proof, trend of the proof, as I see it now, so as to establish any claim here on the basis of quantum meruit. In other words he is not suing on the contract but the contract is here and it is in evidence, and counsel

put it in evidence. The parties had signed it and apparently part of the time they acted upon the contract.

Mr. Dunn: I understand, your Honor. I have been missing your point. I see what you are thinking. I apologize. Excuse me.

The Court: That's all right. Now, gentlemen, would it be all right to suspend now. It is 5:00 o'clock.

(The court recessed at 5:00 p.m., August 11, 1958.) [101]

The Court: Gentlemen, are you ready to proceed?

Mr. Nesbett: Yes, your Honor.

Mr. Dunn: Yes, your Honor.

Mr. Nesbett: Your Honor, I have what I believe are all the records that Mr. Dunn requested in connection with Stuart Construction Company, Inc. I understand that he is going to produce some, if not all, of the records that I asked for in connection with Oaks Construction Company.

The Court: Yes.

Mr. Nesbett: In order not to delay the trial of the case, I suggest, if it is agreeable with Mr. Dunn, that we might make those records available to each other here in the court room, say between one and two?

The Court: I think that is a very good suggestion.

Mr. Dunn: I would like to have those records marked for identification.

The Court: Well, in advance of your examina-

tion—I understand they're available for you; they have to be marked if they are used in evidence, but I see no benefit to you if they're made available for you to examine.

Mr. Dunn: I do, your Honor. The reason— [103] here are two reasons. One is due to a recent hassle with Judge Fee in the Circuit Court; I became very record conscious. The other one is this: I don't suppose your Honor has read the depositions that have been filed.

The Court: No, sir, I haven't.

Mr. Dunn: When I took Mr. Tope's deposition, I went over these records and I had a very difficult time with Mr. Tope, and as that deposition will reveal, at least the way I interpreted it, there is some intimation there by Mr. Tope, to the effect that I might have taken some of those records, and the only way I could establish what records were actually produced was to direct my questions to Mr. Nesbett, who was more than willing and did cooperate with me. But that is the reason I want them marked for identification; I don't want any further question on it.

The Court: I see. Well, they're in your hands, very well. Any reason, Mr. Nesbett?

Mr. Nesbett: I don't even recall any such occurrence, but if we marked all the records that I have brought here for identification, it's liable to prolong the trial for I don't know how long. It seems to me, your Honor, he has gone over the records, entirely, once in Tope's deposition. [104]

The Court: Have you a list of what you are turning over to him?

Mr. Nesbett: I didn't intend to turn anything over to him; I intended to make it available to him here.

The Court: Under those circumstances, Mr. Dunn, it would not be necessary to mark them; it may be that you won't want to use them at all. And, of course, when they're used, the observation is not only to make outside of the Court, but the reason for identifying the documents for use in the Court. And usually where you know what the document is and you know it is identified because of its peculiar nature, it is not necessary to mark it at all. However, it is the practice to mark them all. Now then, the very fact that you have some misgiving about what might be charged against you, they're examined here, the attorneys are all together, why there could be no question about it, so I don't want to take the time now. If you were to mark them all under one cover, why some of them could disappear, so apparently it will take a lot of time to mark each one separately.

Mr. Dunn: Your Honor, I am afraid it will too, because they are voluminous records, but—there is no question at all but what, at least, a number of Mr. Tope's records are going to be offered for evidence. [105]

The Court: When they are, why they can be marked.

Mr. Dunn: If he doesn't offer them for identification, I will.

The Court: Well, then you can mark them as your exhibits.

Mr. Dunn: And the same, of course, will be true of a number of mine and I am most hesitant—they're going to have to——

The Court: The point I make, Mr. Dunn, I do not want to mark a lot of exhibits that merely may not be used in evidence; when they are used and when they are presented in court, why then they will be marked, but to simply, for the use of counsel on something that is speculative, I don't want to take the time of the court to mark the exhibits that may not or may be used in court.

Mr. Dunn: Well, we are not premature, your Honor, I am going to need them to cross-examine Mr. Tope.

The Court: When you do, you ask for them and identify the exhibit and cross-examine him about it. Are you ready to proceed, gentlemen?

Mr. Nesbett: Yes, your Honor.

(Whereupon Mr. Tope resumed the stand.) [106]

The Court: Is he still on direct examination?

Mr. Nesbett: Yes, your Honor.

(Testimony of Stuart E. Tope.)

Direct Examination

By Mr. Nesbett:

Q. Mr. Tope, can you describe to the Court approximately the distance and miles that this rock pile area existed that you described yesterday in your testimony?

A. Well, it run from about twelve to fifteen miles from Tok on north.

Q. I say, can you tell the Court approximately in miles how far that rocky area extended—how long was it?

A. Well, I imagine it was there around fifteen miles of it.

Q. Now, approximately when during the year 1954, did you get through that rocky area?

A. Shortly after February, I think it was around in March, early part of March.

Q. And were all of your cats in operation by the time you got through the rock pile?

A. There was. I believe there was just one left.

Q. And where?

The Court: What do you mean, just one cat, one Caterpillar left?

A. One tractor.

Q. You mean by "left"—what do you mean by "left"?

A. I had three and there was two out of commission and there was one remaining. [107]

Q. Where were the two that were out of commission?

(Testimony of Stuart E. Tope.)

A. One was at—one had already been taken back to Fairbanks and one was sitting at the Robinson River.

Q. And what, briefly, was wrong with the Caterpillar that had been taken to Fairbanks?

A. Well, that is the tractor that had a rod bearing through the side of the motor block.

Q. And what had happened to the other caterpillar that was sitting near Robinson River?

A. Due to extreme cold weather that they have, weather checks in the journals of the crankshaft would eat out the bearings.

Q. Well, is that what had happened to that Caterpillar that was sitting at the Robinson River?

A. That is right.

Q. Did you during the time clearance work was being done on that area, ever get either of those two Caterpillars back into operation?

A. One I did.

Q. And which one did you get back into operation?

A. The one that was at Robinson River.

Q. And did you get that Caterpillar back in action in time to do any work on the clearing?

A. I did not.

Q. Then, of the remaining Caterpillar that was in use after [108] you had gotten through the rock pile, how long was that cat used in clearance work on that job? A. To the completion.

Q. And when was that cat last used on the job?

A. I believe around May 1st.

(Testimony of Stuart E. Tope.)

Q. Now, did you have anything to do with the three Caterpillars you testified concerning yesterday that were rented from McLaughlin Construction, Inc., and brought up to Big Delta to work backward on the line? A. No, I did not.

Q. Do you know who was in charge of those Caterpillars? A. Mr. Abbott.

Q. And was there anyone else specifically in charge of the Caterpillars at the area they were working in? A. Mr. Allred.

Q. Did you have anything to do with Mr. Allred being on the job and running those cats?

A. I did not.

Q. Generally, how did Mr. Allred operate with his cats? What did he do and in what direction did he work on the line?

A. Well, he was working south of Big Delta toward Tok.

Q. Would that be in the general direction of toward where you were operating?

A. Yes. [109]

Q. Where your cats were. Now, when to the best of your knowledge did Mr. Allred and those three Caterpillars come on the job?

A. When did they come on the job?

Q. Yes.

A. Sometime in March, I just couldn't tell you the date.

Q. Now, did those Caterpillars eventually work up to the area where your cats were working northerly? A. Yes.

(Testimony of Stuart E. Tope.)

Q. Now, Mr. Tope, did you use a 2½-ton Dodge fuel truck on that job? A. Yes, I did.

Q. Between what dates was that truck used on the job? When did you first—

The Court: Did you call it a fuel truck?

Q. It is a 2½-ton Dodge fuel truck.

The Court: Yes.

A. It was used in December, the 25th or after the 25th, up until May 1st.

Q. And generally, how was it used?

A. Well, it would distribute the fuel to the tractors. It would haul the grease guns and the oils and lubricants for the tractors.

Q. Was that truck used every day that the Caterpillars operated on the line? [110]

A. Every day.

Q. And do you know from your experience in construction what the reasonable rental rate on such a truck is per month?

A. On a new piece of equipment, which it was, brand-new, that—for that piece of equipment it would run anywhere from five hundred to one thousand dollars a month.

Q. And assessing your charges for rental here, you have assessed eight hundred dollars for it per month, for that equipment. Do you consider that a reasonable rate for that type of equipment in that year? A. I do.

Q. And the Ford—1948 Station Wagon, when did you first commence to use that piece of equipment on the pipeline clearing job?

(Testimony of Stuart E. Tope.)

A. In January, but I just can't tell you the date.

Q. Did you testify yesterday that you bought that approximately a week after you commenced operations?

A. Somewhere in there, yes.

Q. And was it put into use on the pipeline clearing job immediately?

A. Yes, it was.

Q. Was it used throughout the time you were on the job?

A. I used it for going for parts and transporting men, yes.

Q. Did anyone else use that station wagon besides yourself in the clearing job? [111]

A. Mr. Abbott used it and Mr. Allred used it.

Q. For what purpose would they use it?

A. Being foreman on the line, the pipeline; they would go back and forth along the right of way checking over the job.

Q. In assessing a rental rate on that piece of equipment you have charged two hundred and fifty dollars per month; do you consider that a reasonable rental for that type equipment in 1954?

A. I do.

Q. Now, can you state when you first commenced to use the GMC pickup, which you state was on the job and in use in connection with the clearing?

A. From the very beginning.

Q. And that would be in December, would it, or January 3?

A. In December.

Q. And what model pickup was that? What year—what model was it?

A. 1952.

(Testimony of Stuart E. Tope.)

Q. And did that belong to you personally?

A. Yes.

Q. In assessing a rental rate of two hundred and fifty dollars per month, do you consider that a reasonable rental rate for the year 1954, for that model and type of equipment? [112]

A. I do.

Q. Did anyone connected with the clearance job use that equipment besides yourself? A. Yes.

Q. Who and what occasions, generally?

A. Well, it was used for various things, various people used it; I could name a couple of them.

Q: I ask you to name them.

A. Vince Abbott and Mr. Allred.

Q. And what would the purpose of their use be?

A. Going up and down the pipeline.

Q. Was that equipment on the job until May 1 of 1954? A. It was.

Q. Do you recognize this document, Mr. Tope?

A. Yes, I do.

Q. What is it, sir?

A. It's a statement prepared, a cost statement prepared by Wayne Hubbard.

Q. Who is Wayne Hubbard?

A. He is an accountant here in Anchorage.

Q. And what does that statement purport to show?

A. Well, it shows the cost of operation per piece of equipment.

Q. Did you furnish Mr. Hubbard any records to use in the preparation of that document? [113]

(Testimony of Stuart E. Tope.)

A. I furnished him invoices from the Oaks Construction Company.

Q. And generally, what was the nature of the invoice—for what was the purpose of the invoice?

A. The purpose of the invoice was for the men's time and what it would cost to operate the piece of equipment.

Q. Now, what equipment is listed there in that document prepared by Mr. Hubbard?

A. Well, there is one Caterpillar tractor, S 23, and one Caterpillar——

Q. Is that one of the Caterpillars you owned and it was on the job there?

A. That's right.

Q. And what else?

A. There's a Caterpillar, S 22.

Q. And that is likewise a Caterpillar owned by you and on that clearance job?

A. That is right.

Q. Now——

The Court: What is the number of the first Caterpillar?

A. S 23.

The Court: The last one you named was what?

A. S 22. [114]

Q. And were there any other Caterpillars, or were there any others shown on that list?

A. S 24.

Q. Now, does that document prepared by Mr. Hubbard show the cost that would have accrued in order to run that cat on the pipeline clearance

(Testimony of Stuart E. Tope.)

job for the number of hours claimed by you as compensation? A. That is right.

Q. What was the reason for making that cost of operation sheet?

A. To get the cost per piece of equipment.

Q. Are you claiming a rental rate, a reasonable rental rate on those Caterpillars that belong to you at twenty-five dollars per hour for every hour they operated on the clearance job? A. Yes.

Q. How did you determine the number of hours that each cat operated on the job?

A. Taken from the invoices of Mr. Oaks.

Q. Were those payroll invoices forwarded by the Oaks Construction Company to you during the clearance period? A. That is right.

Q. And how did you use those payroll invoices in order to determine the number of hours each Caterpillar had been operated? [115]

A. By taking the man that was operating the piece of equipment at the time.

Q. In other words, your knowledge of who was running that equipment and the number of hours of wages paid to him determined how many hours that cat had been run. Is that your testimony?

A. That is correct.

Q. Now, does that cost of operations reflect other costs in connection with running the Caterpillars, such as fuel, lubrication?

A. It takes in fuel and lubrication, this statement here (indicating), yes.

(Testimony of Stuart E. Tope.)

Q. How was the fuel consumption estimated or calculated as to each Caterpillar for the hours run?

A. Well, they have a—repeat that please?

Q. How was the fuel consumption for each of the Caterpillars calculated?

A. From the number of hours that the cat was used on the job.

Q. Well, was a figure assigned as an hourly consumption? How did you arrive at a figure as to daily consumption or total consumption?

A. Well, it was paid on forty gallons per day per piece of equipment.

Q. And was that a figure given by you to Mr. Hubbard to [116] use in preparing that cost of operation? A. Yes, it was.

Q. Is there an item on that cost of operations entitled, "Lubrication, Prestone, and so forth"?

A. Yes, there is.

Q. And what is the Prestone?

A. It's an anti-freeze used in the radiators of the tractors.

Q. And how did Mr. Hubbard calculate the cost of anti—Prestone supplies to each Caterpillar, in preparing that cost of operation sheet?

A. Well, from invoices I had received from Mr. Bayless.

Q. Now, did you make any allowance or calculations in connection with extremely cold weather where Caterpillars would run twenty-four hours per day? You testified that existed for about one week? A. Yes.

(Testimony of Stuart E. Tope.)

Q. What fuel allowance was made for that week?

A. There was a straight twenty gallons a day.

Q. Per Caterpillar? A. Per Caterpillar.

Q. Now, in your opinion, does that cost of operations, or do those costs of operation sheets reflect the cost that would have been incurred by you in furnishing those cats to an operator or user at twenty-five dollars [117] per hour, if you yourself had paid the salaries, withholding taxes, fuel, repairs, and the miscellaneous lubrication?

A. That is correct.

Q. Then, is the total of that cost of operations, a figure that should be deducted from your total rental claim in this case? A. Yes.

Q. Other than your calculations for fuel consumption per hour on Caterpillars, were the records furnished you by Oaks Construction Company used entirely to prepare that cost of operation sheet?

A. That is right.

Q. Your Honor, I would like to have this marked for identification, at least—well I will offer it in evidence, if Mr. Dunn objects, why he can—

Mr. Dunn: Your Honor, of course, I have no objection to its being offered for identification. As to whether or not—I want to object to admissibility in evidence; I want some time to study it.

The Court: I think that is a reasonable request, you should have time to study it.

Mr. Nesbett: I will give Mr. Dunn a copy, Your Honor.

(Testimony of Stuart E. Tope.)

The Court: What is the marking? [118]

The Clerk: It is Plaintiff's Exhibit 2.

Mr. Dunn: For identification, is that correct?

The Court: That's right. Now, tell me, does it contain the type of deductions of the cost of operation from the total rental charges, or have you got that on a separate sheet?

Mr. Nesbett: No, Your Honor, it doesn't show it on this sheet.

The Court: You have it on a separate sheet, I assume?

Mr. Nesbett: I have not prepared a sheet, but I can before the conclusion of this trial.

The Court: Well it's all right if the witness has gone over it and made the computations. Have you made a computation?

Mr. Nesbett: I have personally, yes; I mentioned it in my opening statement.

The Court: Yes, you did, I made a memo of it.

Q. (By Mr. Nesbett): Mr. Tope, do you recognize that document? A. Yes, I do.

Q. What is it? A. It's a statement.

Q. A statement of what? [119]

A. This is from the rental on the equipment and was calculated as follows on it: 21½-ton truck and Ford Station Wagon and GMC pickup.

Q. Is that a statement of the total rental costs broken down as to each piece of equipment used on that pipeline clearance job of yours?

A. That's right.

Q. Was that statement furnished to Mr. Dunn

(Testimony of Stuart E. Tope.)

at his request as made during the taking of a deposition? A. That is right.

Q. Does that statement reflect the total rental demand that you are making in this case, and broken down roughly as to each piece of equipment?

A. Yes, it does.

Q. Your Honor, we would like to offer this.

The Court: That it the total rentals less the cost, is that the way——

Q. This would be the total rentals. This would be the other exhibit for identification, it would be the cost deduction that he made from this.

The Court: I see, a cost deduction was not made on this sheet?

Q. No, sir.

Mr. Dunn: It's a true copy, Your Honor.

Mr. Nesbett: I should like to offer it in [120] evidence, your Honor, to illustrate the witness' testimony.

The Court: You are marking the exhibit 3, is it?

Mr. Nesbett: Exhibit 3.

The Court: You are offering it in evidence. What do you say, Mr. Dunn?

Mr. Dunn: Nothing, Your Honor.

The Court: Very well. It may be received in evidence.

Q. (By Mr. Nesbett): Do you recognize any of these documents?

Mr. Dunn: Your Honor, while he is looking that over, I meant to suggest this earlier, I don't recognize anyone in the courtroom, but I wonder

(Testimony of Stuart E. Tope.)

if it wouldn't be wise to repeat your request concerning the exclusion of witnesses at the beginning of each day; none of mine were here to hear it.

The Court: Are there any witnesses in the courtroom in the case of United States of America for the use of Stuart Construction Company and Stuart E. Tope against Carl E. Oaks and others? Any witnesses in the courtroom? No answer, I take it they are not here.

Q. (By Mr. Nesbett): Do you recognize those, Mr. Tope? [121] A. Yes, I do.

Q. What are they?

A. They're rental agreements with an option to purchase.

Q. Made with whom and by whom?

A. The Northern Commercial Company, Fairbanks.

Q. And with whom? A. Pardon?

Q. Northern Commercial Company's agreement with whom? A. With Tom Downs.

Q. Now, who is the other party to that contract?

A. Stuart E. Tope.

Q. Did you enter into those agreements with Northern Commercial Company yourself as an individual? A. Yes, I did.

Q. Do they cover the Caterpillars and Dodge truck that you testified were used on this pipeline job? A. Yes.

Q. Are those the original of the agreements?

A. Yes.

Q. Your Honor, I will offer these in evidence

(Testimony of Stuart E. Tope.)

in place of the copies that I offered yesterday. There are four.

The Court: Four of those contracts?

Q. There are five, Your Honor, one is a separate piece of equipment. [122]

The Court: Does it cover each piece of equipment that was used on this job?

Q. Yes, Your Honor.

Mr. Dunn: I would like to have, and I assume it can be readily done, the witness identify these as the equipment that was used on this particular project. And also, I assume it being the same equipment to which he has previously referred.

The Court: Counsel just answered that question and said it is.

Mr. Nesbett: I asked him that.

The Court: As I understand, Mr. Nesbett, we have your assurance that it covers the exact equipment that was used on this job?

Mr. Nesbett: Yes, Your Honor, and I asked the witness, "This is the equipment you used on the pipeline clearance, isn't it? A. It is. Q. That you have been describing it? A. It is."

Mr. Dunn: May I request him, ask him a question?

The Court: Yes, you may.

Mr. Dunn: Is this the same equipment that you previously been talking about, Mr. Tope?

A. The tractors?

Q. You previously discussed equipment that you used on the [123] pipeline job. Now, is that equip-

(Testimony of Stuart E. Tope.)

ment the same as the equipment which is the subject of these agreements?

A. Three tractors, the rear-end control unit, and a 2½-ton Dodge truck, yes.

Q. The answer is "yes"? A. Yes.

Q. Thank you.

The Court: Now, you can mark those all as one exhibit.

Mr. Nesbett: They can be if no one has an objection.

The Clerk: Four-one to three, four, five. (4-1, 4-2, 4-3, 4-4, and 4-5.)

Mr. Dunn: I think the easiest way, I would like to know which one is 4-1, and so on?

Mr. Nesbett: Possibly it might be easier if you gave the Caterpillar number furnished——

The Court: When you get it, it will be marked on the document, Mr. Dunn, so you will be able to identify it then. I take it each document separately just describes each piece of equipment.

Mr. Nesbett: It does, yes, sir.

The Court: Well then, it will have a marking. Their markings are exhibits, plaintiff's exhibits 4-1, 4-2, 4-3, and 4 and 5. [124]

The Clerk: Do they come in number, or how are they, in rotation? Are they by date, or——

Mr. Nesbett: I had them in no particular order there.

The Court: I do not think that is important; the question is here that they are identified as 4-1,

(Testimony of Stuart E. Tope.)

4-2, 4-3, 4-4, and 4-5. You probably purchased them at different times in the contract?

A. Yes.

Q. (By Mr. Nesbett): Were those purchases made roughly between the months of June of 1953, and August of 1953? A. Yes.

Q. With the exception of the Dodge truck, is that right? A. Yes.

Q. When was that purchase made?

A. That was purchased in December of 1953.

Q. All those contracts which are Exhibits 4-1, 2, 3, 4, and 5, were entered into with Northern Commercial Company by you as an individual, were they not? A. They were.

Q. Did——

The Court: May I inquire, was a bill of sale ever given to the corporation? Was it ever transferred to the corporation? [125]

The Court: Very well.

Mr. Nesbett: "Letter heading of Oaks Construction Company, Box 1452, Anchorage, Alaska, Polaris Building, Anchorage, Alaska," as the righthand origin address. "March 22, 1954, Dot Lake Lodge, Alaska. Gentlemen: Since you have not complied with Article 17 of your sub-contract and the Oak Construction Company's letter of 27th of February, 1954, with regard to furnishing performance and payment bonds for your clearing contract with this Company, you are hereby notified that unless you secure and give notice to this Company, that you have secured these bonds by 26th of March,

(Testimony of Stuart E. Tope.)

1954, the provisions of Article 15 will be enforced and the Oaks Construction Company will take over your work and complete same at your cost and expense. Very truly yours, For Oaks Construction Company, Roy S. Crawford, General Superintendent, signed: Roy S. Crawford."

Q. Mr. Tope, I will ask you when you received this letter? Would it have been several days after the date of March 22, 1954?

A. Yes, it would.

Q. Now, was Mr. Allred operating the three McLaughlin Company cats on the other end of the clearing line as of the time you received this letter? [126]

Q. Mr. Tope, did you ever transfer this equipment to Stuart Construction Company, Inc.?

A. I did not.

Q. Now, what is this document, if you know? What is it, Mr. Tope?

A. It's a letter to the Stuart Construction Company.

Q. From whom?

A. From the Oaks Construction Company.

Q. And the date, sir?

A. The date is March 22, 1954.

Q. Was that letter received by you?

A. Yes.

Q. And is it signed by anyone connected with Oaks Construction Company?

A. By Roy S. Crawford.

(Testimony of Stuart E. Tope.)

Q. Your Honor, I'll offer this letter into evidence.

Mr. Dunn: May I have a minute, please?

The Court: No objections?

Mr. Dunn: No, sir, I voice them when I have them.

The Court: Very well, the Court just made inquiry. It's marked and you offer it in evidence.

The Clerk: This will be 5, Judge Reeves.

Mr. Nesbett: Your Honor, this is a very short letter and I would like to read it to—— [127]

A. Yes.

Q. Was the Rogers & Babler rented Caterpillar also working on the job at the time you received this letter? A. Yes.

Q. How long prior to the date of this letter, March 22, to the best of your knowledge, had the Rogers & Babler cat come on the job?

A. Around the first of March.

Q. And did you testify that the Allred spreader, the McLaughlin cats came on early in March to the best of your knowledge? A. Yes.

Q. Did you make any reply to the Oaks Construction Company after you received this letter?

A. No; I didn't.

Q. Do you recognize this paper?

A. Yes; I do.

Q. What is it?

A. It's a letter from the Oaks Construction Company.

Q. What is the date?

(Testimony of Stuart E. Tope.)

A. 16th of April, 1954.

Q. To whom is it addressed?

A. To the Stuart Construction Company.

Q. Is it signed by anyone connected with the Oaks?

A. It is signed by Carl E. Oaks. [128]

Q. Your Honor, I'll offer this in evidence.

The Court: Plaintiff's Exhibit 6?

The Clerk: Yes.

Mr. Nesbett: Your Honor, I should like to read this letter.

The Court: Very well.

Mr. Dunn: Excuse me one second, Buell, while you are doing that I would like to get this other one while you are reading that. May I see 5, please?

The Clerk: Yes.

Mr. Nesbett: Exhibit 6, your Honor, is a letter on Oaks Construction Company letterhead. "Box 1452, Anchorage, Alaska." Dated, "16th April, 1954. Registered Mail, return receipt requested," typed up in the left-hand corner of the page, addressed to: "Stuart Construction Company, P.O. Box 517, Anchorage, Alaska. Attention: Mr. Stuart Tope, President. Gentlemen: Your attention is directed to our letter of March 22, 1953, notifying you that it was the intention of this Company to enforce the provisions of Article XV in the event you did not comply with the bonding requirements outlined in Article XVII of your Subcontract for clearing work on the Products Pipeline system,

(Testimony of Stuart E. Tope.)

C. E. Project Eng. 95-507-54-1 (Contract DA-95-507, eng-573).

“Your apparent abandonment of the job, and removal of your [129] equipment from actual work on April 15, 1954, is also deemed specific grounds for invoking Article XV.

“Now, therefore, it is the opinion of this Company that your not ‘proceeding with diligence and in such a manner as to satisfactorily complete said work within the required time.’

“You are formally given notice, that Oaks Construction Company, having given reasonable notice in writing, now effective this date, exercises its rights under subcontract agreement, Section XV specifically, ‘To take over said work and to complete the same at cost and expense to Subcontractor, without prejudice to Oaks Construction Company’s other rights or remedies for any loss or damage sustained.’” Signed: “Oaks Construction Company.” “Signature, “Carl E. Oaks.”

The Court: Did that say the machinery was taken off the 15th of April?

Q. Your Honor, it said, “Your apparent abandonment of the job, and removal of your equipment from actual work on April 15, 1954.”

The Court: Yes.

Q. Now, Mr. Tope, did you have any equipment—rather, I’ll ask you first, when did you receive this letter of April 16, 1954?

A. If it came from Anchorage, I don’t think

(Testimony of Stuart E. Tope.)

I could have gotten it less than two or three [130] days.

Q. You did receive it nevertheless, didn't you?

A. Yes.

Q. At the time you received it, did you have any equipment working on that clearing job?

A. Yes; I did.

Q. What equipment did you have on the job?

A. There was one tractor and the 21½-ton truck and a pickup.

Q. Were you on the job yourself at the time you received this letter? A. Yes.

Q. Did your equipment remain on the job for any period of time after you received this notice?

A. Any time around May 1.

Q. Did your Caterpillar remain on the job until May 1? A. Yes.

Q. Was it operating?

A. As far as I know, it was, yes.

Q. And did your Dodge truck remain; your fuel truck remain on the job until May 1?

A. Yes; it did.

Q. How about your—the Ford Station Wagon?

A. Yes.

Q. And did you, yourself, stay on the job after you received this letter?

A. Yes; I did. [131]

Q. How long after the date of—after the receipt of this letter did you, yourself, remain on the job?

A. I remained right there up to the very end.

(Testimony of Stuart E. Tope.)

Q. Did you receive your foreman's pay in the latter part of April of 1954?

A. No; I didn't.

Q. Did your pay as foreman stop somewhere around the date of this letter, to the best of your knowledge?

A. I believe before.

Q. Now, what duties were you performing at the time this letter reached you?

A. Well, I was expediting parts mostly.

Q. Was Mr. Abbott still running the job for Oaks?

A. Yes; he was.

Q. Was Mr. Allred running his cats at the other end, working toward you, for Oaks and running the McLaughlin cats?

A. Yes; he was.

Q. And was the Rogers-Babler Caterpillar working in the area where you were also working?

A. Yes; it was.

Q. Was May 1 the last date that you have charged any rental on any of your equipment against Oaks Construction Company?

A. I believe it is. [132]

Q. What did you do with your last remaining Caterpillar and the Dodge truck after they were removed from the job on May 1?

A. I took the 2½-ton truck back to Fairbanks and turned it into the N. C. Company.

Q. And what did you do with the Caterpillar?

A. The——

Q. Was that Caterpillar in total running order?

A. No; it wasn't.

Q. What was wrong with it?

(Testimony of Stuart E. Tope.)

A. The starting motor was out of time.

Q. What did you do with the Caterpillar?

A. I finally got another cat over there and got it started and run it from Dot Lake to—I operated it myself and run it from Dot Lake to Tok Junction.

Q. And what distance was that?

A. Around fifty miles.

Q. And what did you do with the Caterpillar then?

A. Tore the starting engine off and repaired the starting engine.

Q. Now, about when did you perform that work?

A. Some time in May or June, somewhere in there.

Q. Now, was the entire clearing work completed as of May 1, the date you took your equipment away from the job? [133]

A. I think that it was about another week after that.

Q. Why did you leave the job before the work was completed?

A. Well, I couldn't get anybody to talk to me or anything so I just shut my equipment down; I had never received any money; wasn't even receiving a paycheck, so I just shut it all down.

Q. Did you have any discussion with Oaks during the month of May about payment for the use of your Caterpillar or the work you performed?

A. No.

Q. Did you have any discussion with Mr. Craw-

(Testimony of Stuart E. Tope.)

ford in that respect? A. I can't recall.

Q. What did you do with all of your caterpillar equipment, all three of them? What happened to them?

A. Well, the one, I took to Fairbanks, the other one was sitting along Robinson River. I lifted the motor out of it and took it down to Forty Mile country and had the crankshaft ground and new bearings put in it and fixed it up so it would run.

Q. And did you run it or deliver it anywhere, take it anywhere?

A. Yes; I took it to—I took it down to Salana.

Q. Now, did you, subsequent to leaving the job, on May 1, [134] attempt to arrange any meeting with representatives of Oaks Construction Company in order to talk about your problem of payment? A. Yes; I did.

Q. And what generally, what attempts were made and what happened?

A. I talked to the Northern Commercial Company and I asked them to set up a meeting with Williams Bros., McLaughlin and Marwell Company—

Mr. Dunn: Excuse me, your Honor. I don't see the relevancy of this. If it's relevant, I would appreciate it being pointed out to me.

The Court: Well, all that is necessary is for him to say that he tried to get a conference. Now, if he got the conference, he can say that and whatever happened in the conference he can disclose.

Mr. Nesbett: All I asked was what he did to

(Testimony of Stuart E. Tope.)

try and arrange a conference and he was explaining.

The Court: He gave some details that I don't think was important and I think that is what counsel objected to. He can tell what he did and not what was said or done by anybody.

Mr. Nesbett: He hasn't quoted anyone yet; I was going to stop him if he started to. Were [135] you——

Q. What did you do to try and arrange a meeting with Oaks Construction Company? Did you say you went to the N. C. Company?

A. Yes.

Q. Was that for the purpose of arranging a meeting with Oaks? A. Yes; it was.

Mr. Dunn: It seems to me it's only directed to a demand for payment and the mere fact he files a suit shows demand for payment.

The Court: Leading up to it, what was said in the conference would bear on the issues, whether there was a refusal to have a conference.

Q. (By Mr. Nesbett): Was a request made of Oaks Construction Company for a conference?

A. Yes; there was.

Q. And did you make any such request yourself to Oaks Construction Company?

A. No; I didn't.

Q. Was such a request made by Northern Commercial Company at your request? A. Yes.

Q. Was any——

Mr. Dunn: I move to strike it, your Honor, [136] it is hearsay.

(Testimony of Stuart E. Tope.)

The Court: Well, I am going to let it stand until it appears, of course, if that is mere hearsay and somebody told him that, it would not be competent.

Q. (By Mr. Nesbett): Do you know that such a request was made by the Northern Commercial Company? A. Yes.

Q. Was a tentative date for any meeting set up?

A. Yes; there was.

Q. And during what month was this meeting set up? A. In August.

Q. Of what year? A. 1954.

Q. And where was the meeting to occur?

A. In Fairbanks.

Q. And did any such meeting materialize?

A. It did not.

Q. Was there a date set for the meeting?

A. Yes; there was.

Q. Were you to be there? A. Yes, sir.

Q. Did you go to the place of the meeting at the time [137] appointed? A. Yes.

Q. Did a representative of Oaks Construction Company appear at that time?

A. He did not.

Q. Did he appear at any subsequent time?

A. Yes; the day before.

Q. And who, if you know, appeared the day before?

A. A gentleman by the name of Hancock.

Q. Do you know Hancock's position with Oaks Construction Company?

A. Office Manager.

(Testimony of Stuart E. Tope.)

Q. Were you ever able to meet with any representative of Oaks Construction Company and a representative of Northern Commercial Company to discuss payment on this work?

A. No; I wasn't.

Q. Were——

Mr. Dunn: I move to strike it. Again I don't see the relevancy of it.

The Court: Well, I think it would be relevant as to the attitude of the parties after the alleged service was rendered. He says he attempted to get a conference and he was unable to do so; he said he knew about it. [138]

Mr. Dunn: I don't understand why the attitude of the parties is relevant. I think we will probably stipulate that they don't like each other by the time——

The Court: There may have been some utterance, or something was said. Now, if he attempted to get a conference about his claimed rentals here on this property and they refused to confer with him, I think that would be competent evidence.

Mr. Dunn: All right.

Q. (By Mr. Nesbett): Did you make any request of Oaks Construction Company that they meet with you and a representative of Williams Bros. to discuss payment for work done on this pipeline? A. Yes; I did.

Q. Did you receive any reply from Oaks Construction Company concerning that request?

A. I did not.

(Testimony of Stuart E. Tope.)

The Court: When did that occur?

Q. When did you make that request of Oaks Construction Company?

A. I made it through the Northern Commercial Company.

Q. Now, was any notice—I'll strike that question. [139]

Do you, yourself, know that any meetings were had between Oaks Construction Company and Northern Commercial Company with respect to settlement of payment for the work you did do on this pipeline?

A. I heard of it, yes.

Q. Well, do you know that such a meeting and such a settlement occurred?

A. Yes.

Q. When did it occur?

Mr. Dunn: Your Honor, he is probably testifying to hearsay again; he says——

The Court: Well, he says he knows; he first said he heard about it, that would not be competent. Now, counsel asked him if he knew there was such a settlement and he said, "yes," he did.

Mr. Dunn: Well, the proper foundation, your Honor, is how he knows, whether he knows of his own personal knowledge, or somebody told him, and his statement that he knew about it——

The Court: If you want to bring that out on Voire Dire examination, you are at liberty to do that.

Mr. Dunn: All right.

Q. (By Mr. Nesbett): Have you seen any written result of any such settlement? [140]

(Testimony of Stuart E. Tope.)

A. Yes.

Q. Was a written settlement made between Northern Commercial Company and Oaks Construction Company? A. Yes.

Q. And were you present during that settlement? A. I was not.

Q. Did you know that such a settlement was being discussed and made?

A. No; I did not.

Q. Have you consented or assented to the settlement at any time since learning of it and seeing the terms of the settlement? A. No, sir.

Q. Mr. Tope, in Paragraph 8 of the defendant's counterclaim, an allegation is made that to the effect that some \$71,416.29 worth of advances and bills were incurred in connection with this pipeline clearing job, at your insistence and request?

The Court: What's the number of that?

Q. Paragraph 8, your Honor, on page 3 of the counterclaim.

Mr. Dunn: Right at the bottom, sir.

The Court: Yes. [141]

Q. (By Mr. Nesbett): Did you, yourself, have anything to do with obligating Oaks Construction Company in the sum of \$71,416.29?

A. I did not.

Q. Do you understand fully what they mean by alleging that you have caused them to be—or that you have incurred bills and payroll advances in that large sum? A. No, I don't.

(Testimony of Stuart E. Tope.)

Q. In paragraph 10 of the counterclaim on page 4, it's alleged that—and I am reading it from the paragraph—“In addition to said sum of \$38,080.82, plaintiffs have pledged the credit of defendants and have done acts and permitted acts to be done which have resulted in indebtedness, which, unless paid for by defendants, will result in lienable items and claims against payment and performance bonds which will ultimately have to be paid by defendants, all to the sums of not less than \$6,000.00. Such acts of plaintiffs were wholly unauthorized by defendants, or any of them, and wholly unjustified.”

Q. Do you know what they mean by that allegation, Mr. Tope? A. I do not.

Q. Do you admit or deny those statements?

A. I deny it.

Q. Paragraph 9 alleges that, “You owe Oaks Construction [142] Company \$38,080.82.” Do you admit or deny that? A. I deny it.

Q. In Paragraph 12 of the counterclaim on line 3 it alleges that you have maligned and jeopardized the credit rating and business representation of the defendants. Do you admit or deny having have done any such thing? A. I deny it.

Q. Have you ever at any time seen any accounting produced by Oaks Construction Company as to how they themselves came out on their sub-contract in this clearing job? A. I never have.

Q. Have you yourself been sued as a result of this pipeline clearing job? A. Yes, I have.

(Testimony of Stuart E. Tope.)

Q. And by whom were you sued?

A. By Bayless or the Franklin Mining Company and Mr. Harlan.

Q. And what was the nature of the suit filed by Franklin Mining Company, and what amount was involved?

A. For fuel on the pipeline clearing.

Q. And what amount did he sue for?

A. Three thousand dollars.

Q. Where was that suit commenced? [143]

A. In Fairbanks.

Q. Now, is the suit still pending, has it been settled, or tried? A. No, it hasn't.

Q. What were the circumstances surrounding the claim of Franklin Mining Company in the amount of three thousand dollars? How did that claim arise, if you know?

A. Mr. Bayless hadn't been paid for his fuel and he asked me—said that he would—had stopped giving us any fuel until he had gotten some money; I immediately called the—Mr. Crawford in Fairbanks.

Q. Who?

A. Mr. Crawford in Fairbanks, and told Mr. Crawford the circumstances and Mr. Crawford came down and I had a meeting with Mr. Bayless and Mr. Crawford in the Tok Lodge. And Mr. Crawford said, "Oaks is making all the—paying all the bills and that he should have this—plenty of money. He has plenty of money coming." And he said, "You

(Testimony of Stuart E. Tope.)

go ahead and we guarantee you all these bills. You go ahead and give them the fuel."

Q. Who said that to whom?

A. Mr. Crawford said that to Mr. Bayless, and Mr. Bayless said, "I can't do that," he says, "I have to have [144] some money." So Mr. Crawford told him, he said, "A check would have to come from Anchorage for it." And I told Howard Bayless—he said he had to have some money, so I told Howard, I says, "Well, if I give you a check for three thousand, will that be sufficient?" and he said, "yes." And I said, "Well, will you hold it two or three days until they get some money in there for me and so that it will clear?" And he said, "yes," and Mr. Crawford said that there was plenty of money, that I had done enough clearing that there would be plenty enough money that would be there for it.

Q. What happened to that check, did you give it to Mr. Bayless? A. I did.

Q. And was it cashed by Mr. Bayless; what happened to it? A. It was returned NSF.

Q. And has it ever been paid that amount, \$3,000, to Mr. Bayless, to your knowledge?

A. It has not.

Q. Who had been paying Mr. Bayless' fuel bill for fuel used on your equipment up to that time?

A. Mr. Oaks.

Q. Do you know why the three thousand dollar bill was not paid by Mr. Oaks? [145]

A. I haven't any idea.

(Testimony of Stuart E. Tope.)

Q. Did you—did Mr. Oaks pay any or all subsequent bills for fuel incurred for the Franklin Mining Company? A. Yes.

Q. And——

The Court: What was the date of when this check was given?

Q. Do you know the approximate date on that check, Mr. Tope? A. I do not.

Q. Approximately how long after the pipeline job commenced did this occur?

A. I can't recall.

Q. I think we will establish it, your Honor, fairly accurately with another witness, Mr. Bayless himself. Now, what is the other suit you mentioned, commenced by Mr. Harlan, was that filed in Fairbanks District Court, also? A. Yes.

Q. In the total amount of five hundred twenty-seven dollars and nineteen cents, has Mr. Harlan been paid the sum demanded in that suit?

A. No; he hasn't.

Q. Is the suit still pending?

A. Yes. [146]

Mr. Nesbett: I believe that is all, your Honor, with exception of offering it or asking Mr. Dunn at this time if my exhibit 2 has been examined and whether he has any objection to it being accepted into evidence?

Mr. Dunn: It hasn't been examined, your Honor; I have been listening to the witness.

The Court: Very well. You are through with direct examination?

(Testimony of Stuart E. Tope.)

Mr. Nesbett: Yes, your Honor.

The Court: Very well, you may cross-examine.

Cross-Examination

By Mr. Dunn:

Q. Your Honor, I would appreciate a recess if we can have it.

The Court: Would five minutes be plenty of time?

Q. It will give me enough time.

The Court: The Court stands recessed for ten minutes.

(A ten-minute recess was taken at 11:20 a.m.)

The Court: I believe you are ready for cross-examination, are you?

Mr. Dunn: Yes, sir.

The Court: Very well, the witness may [147] resume the stand.

Q. (By Mr. Dunn): Your Honor, it is pretty standard practice in this Court to require counsel to stand. I would like permission to remain seated, if I may, while I cross-examine the witness?

The Court: Very well.

Q. Mr. Tope, when did you say that Stuart Construction Company was incorporated?

A. I believe around in November of '52.

Q. Have you been president of that corporation since the time it was incorporated? A. Yes.

Q. Do you have a stock book to that corpora-

(Testimony of Stuart E. Tope.)

tion? A. I have stock certificates.

Q. Are they available in this courtroom?

A. No; they're not.

Q. Where are they?

A. They are in a safety deposit box.

Q. Where is the safety deposit box?

A. National Bank of Alaska.

Q. In Anchorage? A. Yes.

Q. In whose name are these certificates?

Mr. Nesbett: Your Honor, I'll object, I [148]
don't see the relevancy of all this.

The Court: Well, counsel has challenged the corporate entity and he would have a right to make inquiry about it to establish it. It is still in the background as an entity claiming or may claim some interest in the lawsuit, so counsel have a right to ask questions about it.

Mr. Dunn: In whose name or in what name, as the case may be, are these certificates?

A. They are in Mr. Sanders, attorney here in town, Stuart Tope, Bertha Tope, and Donald Maynick.

Q. Your Honor, I would very much appreciate your directing the witness to produce those this afternoon.

The Court: Well, I do not think that would be evidence as to whether it is a corporation or not. Now, that would be merely to give you information and satisfy your curiosity, but I can't see where it would be of any material help in the case. If it

(Testimony of Stuart E. Tope.)

bears on the question of corporate entity then you would be entitled to see them.

Mr. Dunn: I think it would, your Honor; the fact that—of course, if they are in existence it would help me, but if they are, in fact, non-existent, it would be one of a number of [149] developments which would tend to disprove corporate entity.

The Court: You are not asking merely for evidence just for your inspection. They would be no benefit in the trial of the case as evidence, unless, as you say, the evidence shows it was not a corporate or something of that effect; I can't see where they would be of any benefit, but are you—is it because of your challenge that it's not a corporate entity?

Mr. Dunn: Yes.

The Court: Would you produce those for the inspection of counsel this afternoon?

Mr. Nesbett: I'd like to say a word on that, your Honor; I don't know whether he can produce the certificates or not. It is rather an unusual thing to ask a man to run around and round up certificates that had been issued to shareholders.

The Court: He says they are in the box down there.

Mr. Nesbett: I can, and I have here receipts taken off each certificate showing that they were received by the persons to whom the certificate was issued at the time of issuance.

The Court: Yes.

(Testimony of Stuart E. Tope.)

Mr. Nesbett: And that is one of the [150] things I thought we could handle between one and two, possibly.

The Court: I was proceeding, of course, you would not have to gather up certificates and hand them to somebody else. Of course, he said they were in the box down there.

Mr. Nesbett: I don't know whether he meant his wife——

The Court: I think a single certificate would be sufficient; if they are all there, bring them all over.

Mr. Nesbett: There is a receipt for every certificate issued.

The Court: Well, ordinarily there is a stock book used by corporate entities and, however, the witness says they are in the box and it will be a simple matter for him to bring them over and let counsel see them; where I can't see that would be of much benefit——

Mr. Dunn: Well, do you have your stock book present in court, Mr. Tope?

A. Mr. Sanders made those stock certificates up.

Mr. Dunn: Do you have your stock book present in court?

A. I do not. [151]

Q. (By Mr. Dunn): Do you have receipts for those stock certificates present in court?

The Court: I believe that counsel said that they were here, didn't you, Mr. Nesbett?

Mr. Nesbett: I did, yes.

(Testimony of Stuart E. Tope.)

Mr. Dunn: May I see those, please?

Mr. Nesbett: Now, this is the sort of thing, your Honor, I objected to as delaying the trial, because he has gone all through this a year ago in depositions; he could have asked for it before the trial and he could go over it from one to two today, but no, we have to stop in the middle of a trial for it, is what I object to.

The Court: Could you proceed with your cross-examination and examine those at a later time?

Mr. Dunn: Yes, your Honor.

The Court: There they are so you have got them.

Mr. Dunn: I'll want to examine the witness with respect to them; that's the reason I was asking.

The Court: Very well. [152]

Q. (By Mr. Dunn): Do you know how many shares of stock were issued, Mr. Tope?

A. They're on those certificates there.

Q. Are these the certificates you are talking about? A. They are.

Q. Do those show the four stockholders that you named? A. Yes.

Q. What consideration was given the corporation for these stock certificates? A. Monies.

Q. How much money?

A. The first deposit on that, I believe, was in—it was to the City National Bank and, I believe, around three thousand dollars.

(Testimony of Stuart E. Tope.)

Q. For the stock evidenced by all of these certificates? A. Yes.

Q. I'll return them to you, Mr. Tope, and ask you how many shares are represented by these stubs?

A. Five shares to Stuart Tope, five shares to Donald Maynick, and five shares to Bertha Tope, and one share to William Sanders.

Q. That would be 16 shares, is that correct?

A. That is correct.

Q. Well, now the three thousand dollars that you [153] mentioned, was that in payment for the entire 16 shares?

A. That was in—for the—for 15 shares.

Q. Is it true then that that was for all of them except that of Mr. Sanders?

A. That is right.

Q. And who paid the three thousand dollars?

A. Bertha Tope and Donald Maynick and Stuart Tope.

Q. In equal amounts? A. No.

Q. How much did Stuart Tope pay?

A. Stuart put in it, well, there was five hundred dollars from Donald Maynick and five hundred from Bertha and five hundred from me for my stock and the balance of the money I put up myself to make up the three thousand dollars to give the corporation an account.

Q. Does this stock have a par value?

A. I believe that is in the minutes of the corporation which are there in the courtroom here.

(Testimony of Stuart E. Tope.)

Q. Well, do you know?

A. I offhand, I believe one hundred dollars a share.

Q. And do I understand you correctly to state that the stock for Bertha Tope, Donald Maynick, and Stuart E. Tope was paid for by paying the amount of fifteen [154] hundred dollars?

A. Five hundred dollars each.

Q. Well, that is fifteen hundred dollars, isn't it?

A. Yes.

Q. And it was fifteen hundred dollars, then, that went to pay for this stock?

A. That's right.

Q. Now, I—and each stockholder paid five hundred dollars? A. That is right.

Q. How about Mr. Sanders, here?

A. Mr. Sanders' share was taken for services rendered.

Q. To whom?

A. I don't understand you.

Q. Services rendered to whom?

A. To the Stuart Construction Company.

Q. In the course of incorporating it?

A. That is correct.

Q. Your Honor, I would like to have these marked for identification, if I could? They are receipts numbered one to four; four certificates numbered one to four, representing the total of sixteen shares of Stuart Construction Company. Now, whether or not they will become material as evidence depends entirely upon the stock certificates,

(Testimony of Stuart E. Tope.)

whether [155] or not they're produced. If they are produced then these things won't have any great value.

The Court: Of course, if the stock certificates are outstanding the witness should not be required to come up and find the stockholders in order to bring the certificates in.

Mr. Dunn: That is true.

The Court: But if they are in the vault, as he indicated, why he can bring those over.

Mr. Dunn: That is the reason I asked him for them. May I have these marked for identification, please?

The Court: Yes.

Mr. Dunn: You are familiar with them, are you not?

Mr. Nesbett: Yes, but I would like to ask how——

The Court: I am unable to perceive at this time, but maybe somewhere along the line they may have a bearing, I don't know.

Q. (By Mr. Dunn): Now, what was the other fifteen hundred dollars, then, Mr. Tope; you said three thousand dollars was deposited to the corporate account, did you not?

A. I believe it's around that amount, yes. [156]

Q. And the remaining fifteen hundred was what then?

A. Well, just put money in there to help the corporation, to give it a bigger balance.

Q. And that was your money?

(Testimony of Stuart E. Tope.)

A. It was.

Q. Were these certificates issued on the date shown on the receipt?

A. I believe that's in the minutes of the corporation. I just can't tell you.

Q. I am not asking you what the minutes say; I am asking whether or not the certificates were issued on the dates shown on the receipt?

A. I imagine they were.

Q. Do you know whether or not they were?

A. That's quite some time ago; I can't recall it.

Q. If I showed you the receipts would that be of any aid to you?

A. If it states on the receipt that the stock was issued at that time, it was issued at that time.

Q. Thank you.

Now, at the same time, was the money deposited in the City National Bank?

A. I believe that it was.

Q. In what account?

A. Stuart Construction Company. [157]

Q. That is a corporate account, is it?

A. Yes.

Q. Did you testify on direct examination that you refused to lease your cats, your Caterpillar tractors to Mr. Oaks? A. Yes; I did.

Q. And you did so refuse? A. I did.

Q. Tell me why.

A. I didn't hear you, sir.

Q. Will you tell me why, why you refused to lease them to Mr. Oaks?

(Testimony of Stuart E. Tope.)

A. Usually, when they lease a piece of equipment, they don't take care of it like you would if you were doing it yourself.

Q. Is that the only reason you refused to lease it to him? A. I believe so.

Q. Did you testify on direct examination that you attempted to obtain a bond from someone by the name of Molitor? A. I did.

Q. And did you so attempt? A. I did.

Q. Do you know that man's first name?

A. Frank Molitor. [158]

Q. Are you sure it's Frank; could it be Hank?

A. Frank J., I believe; I am not positive of that, no.

Q. Was he a heavy-set man or slender man?

A. He was a very heavy-set man.

Q. Well, this bonding business of his, did it have a name? A. I couldn't say.

Q. Was that bonding business carried on in an office?

A. That I can't tell you. He had an accounting office at that time.

Q. At what place did you consult Mr. Molitor about this bond?

A. Above the Glass Sash and Door Company on Fourth Avenue.

Q. In an office? A. In an office.

Q. Did that office bear the name of any business?

A. It was an accounting concern, yes.

Q. It bore the name of an accounting business?

(Testimony of Stuart E. Tope.)

A. Yes.

Q. Was there any sign on the door advertising bonding or anything like that?

A. There was not.

Q. How did you happen to go to Mr. Molitor?

A. I was told to go there.

Q. By whom? [159] A. By Mr. Oaks.

Q. Now, when was this, please?

A. It was some time in December or November, somewhere in there.

Q. Of what year? A. Of '53.

Q. Was it before Plaintiff's Exhibit 1, which is the contract between Oaks Construction Company and Stuart Construction Company, was signed? A. It was before.

Q. Well, now, did Mr.—you say Oaks told you to go there; is that Oaks himself, the gentleman sitting on my left? A. Yes.

Q. Well, now, did he tell you to go there, or did he advise you to go there?

A. He advised me to go there.

Q. Well, you said, did you not, that you went to another company? A. Yes.

Q. What company was that?

A. They were in the—I can't recall the name of the outfit, but they have since gone out of business and they were on—in the union halls of the 302 Union, International Union of the Operating Engineers [160] Building, and the Truck Drivers Union, and I think there was one other there, but they were in that building.

(Testimony of Stuart E. Tope.)

Q. Where is that building?

A. It's on Sixth Avenue, across the street from the old high school.

Q. That would be on what street, between what street? A. It would be between F and G.

Q. Did Oaks tell you to go there?

A. He did not.

Q. Did he advise you to go there?

A. He did not.

Q. To which place did you go to first?

A. I believe I went to this company I just mentioned, first.

Q. Well, did you go to any other bonding company? A. They're the only two.

Q. Well, as of that time, Mr. Tope, had you been in the construction business in this Territory about four years?

A. Well, I had been in the construction business since I have been here, acting as in a supervisory capacity to various construction firms here.

Q. Well, prior to this time, now, the time you were trying to get the bond, and your experience in [161] construction work, if I understand you, now, was limited to a supervisory capacity?

A. I had been in the contracting business as a building contractor, yes.

Q. When?

A. Well, in various times. It was in 1945 or '44 to, oh, up to '49, and from 1951 through '52.

Q. Well, what did you do—when did you come to the Territory; you came in '49?

(Testimony of Stuart E. Tope.)

A. That is right.

Q. I am interested only in your activities subsequent to that time, after your arrival in the Territory in '51 and '52, were you in the contracting business? A. Yes.

Q. As a contractor or what?

A. As an independent builder contractor—contracting building, yes.

Q. Did you work under contracts?

A. I did not.

Q. Now, I didn't say sub-contracts, Mr. Tope.

A. I worked under no contract.

Q. Neither a prime contract nor a sub-contract?

A. No, sir.

Q. Now, did that situation exist from the time you came to the Territory until you went to work for Oaks, that [162] you worked under no contract? A. I did not.

Q. Then the situation did exist during that period of time, is that correct?

A. Repeat the question, please?

Q. Then the situation did exist during that period of time, is that correct?

A. That there was no contract?

Q. That you—I'll repeat the question. From the date of your arrival in the Territory of Alaska, 1949, until such time as you made this contract with Mr. Oaks, is it true that you had not engaged in the construction business as either a contractor or a sub-contractor?

A. Yes; I had the Tope's Construction Com-

(Testimony of Stuart E. Tope.)

pany, yes. But I was building my own houses under that name.

Q. Well, now, you are distinguishing between yourself and Tope Construction Company?

A. But as for taking a sub-contract or a contract with any other firm, I did not.

Q. Now, is that you as an individual you are talking about?

A. I'm talking about me as an individual, that is right.

Q. How about this Tope Construction Company that you mentioned, did that take any contracts or sub-contracts?

A. No; they did not.

Q. How about Stuart Construction Company, Inc.? [163]

A. Yes; they did.

Q. Well, what contracts did Stuart Construction, Inc., take?

A. Well, the only one that they did was signed, the contract with Mr. Oaks.

Q. All right, but prior to that time they had taken none, is that correct?

A. That is right.

Q. And you had no occasion to try to get a bond prior to December or November of 1953, is that correct?

A. That is correct.

Q. And is the same true of Stuart Construction Company, Inc.?

The Court: Would you repeat the question, please?

(Testimony of Stuart E. Tope.)

Q. Is the same true of Stuart Construction Company, Inc.?

A. That they did not take a contract?

Q. That they had no occasion to try to get a bond previous to November or December of 1953.

A. None whatsoever.

Q. Then it is true? A. That is true.

Q. And——

The Court: Are you at a point where we might suspend, Mr. Dunn? [164]

Mr. Dunn: Beg your pardon?

The Court: Are you at a point where we might suspend, now?

Mr. Dunn: It makes no difference to me.

The Court: Yes. I will have a small matter that may take ten minutes after 2:00 o'clock so I am going to adjourn until 2:00 o'clock, but you gentlemen need not be here at exactly at 2:00. If you will be here at ten minutes after 2:00, it's all right.

Mr. Nesbett: I would like to see Mr. Oaks' records that Mr. Dunn provided, at 1:00 or 1:15 here in the courtroom, and, of course, the records I brought are available. I don't want to take the Court's time.

The Court: I think that is very commendable. Have you the records here that counsel might inspect them?

Mr. Dunn: Yes; I have a slug of them.

The Court: It would be agreeable then for you to do it—you gentlemen here, it's all right at 2:00 o'clock, I just wanted it for your convenience.

Mr. Dunn: Well, your Honor, I am perfectly willing to turn my records over to Mr. Nesbett. I am not going to accuse him of taking any of them and [165] I know Mr. Oaks isn't. I would prefer myself not to be here at 1:00 o'clock. Now, I will make these—I have already stored some books there.

The Court: Make them available to Mr. Nesbett.

Mr. Dunn: And I'll store some other things here.

Mr. Nesbett: Well, I don't want them, your Honor, I learned from experience that I might lose some and then I would have a hard job of ever explaining it; I'd rather look at them here, and possibly if the Bailiff is here, or if not, Mr. Dunn, or at least someone, so that I could look at them and whoever had custody of them would have the same books when through as they had when they started.

The Court: Mr. Johnson will be here. Let the Court stand in recess until 2:00 o'clock.

(The Court then recessed until 2:00 o'clock p.m.)

Afternoon Session

(The trial was continued.)

The Court: Are the parties ready to proceed in the case on trial?

Mr. Nesbett: Yes, your Honor.

Mr. Dunn: Yes, your Honor. Mr. Nesbett asked

for records which I left in the court and they [166] keep coming up and here is some more.

The Court: More records?

Mr. Dunn: That I would like to deposit.

The Court: Is the plaintiff here? The plaintiff is on cross-examination, I believe.

Mr. Nesbett: Your Honor, Mr. Dunn—I have checked with him and he doesn't want to stipulate that my exhibit, the cost of operations—I haven't got the number right now; I think it is number 2 G, into evidence without examining the accountant who prepared it; and I have the accountant here now with his work sheets and Mr. Dunn has agreed that I can put him on out of order.

The Court: Very well, you may do that.

Mr. Nesbett: I'll call Mr. Wayne Hubbard.

Mr. Dunn: I'd like to make a comment, your Honor, in the hope of saving some time. I don't know whether I will or not; I believe that is Exhibit 2 F that is in question here.

The Court: I think you are right about that and, as I understand it, the sole purpose of going in—of calling Mr. Hubbard is to establish accuracy, or, rather, the—yes, it would be accuracy or the amount of this deduction, the amount by which they are willing to reduce their claim. [167]

Mr. Dunn: Now, we have, of course, no objection to their reducing the claim in that amount. I don't see what's going to be served by talking to Mr. Hubbard.

The Court: I don't either. Irrespective of whether this proves to be accurate or inaccurate,

it is a matter of computation. The witness testified what the—as I recall, what the expenses were. Now, then, he testified what he considered the rentals, so it's purely a matter of deduction.

Mr. Dunn: It can't very well go to our claim. We are, of course, going to set up our own costs on this thing and my feeling is that it would sort of be a waste of time.

The Court: Well, that would be my notion about it, because I understand counsel made the computation; the witness testified and upon his testimony you made the computation, did you not, Mr. Nesbett?

Mr. Nesbett: Yes, but I want Exhibit 2 in evidence for your Honor's consideration when this case is closed, and if he won't stipulate that it can go into evidence, I would like to put the man who prepared it on so I can offer it and get a [168] ruling.

The Court: Is he qualified?

Mr. Dunn: Well, then we need Mr. Hubbard if it is going into evidence, and it's to be considered as evidence, then I want to attack the credibility of it.

The Court: Well, let Mr. Hubbard be sworn then.

WAYNE HUBBARD

called as a witness for and on behalf of the plaintiff, and, being first duly sworn, testifies as follows on:

Direct Examination

By Mr. Nesbett:

Mr. Dunn: Mr. Nesbett, these records I left for your inspection, do you want them to remain here?

Mr. Nesbett: I didn't finish going through them all; now I understand you have some more. Yes, I would like to see them.

Mr. Dunn: Do you want them left in Court here? You won't have a chance to look at them any more today, will you?

Mr. Nesbett: No.

Mr. Dunn: You have no objection if I take them with me?

Mr. Nesbett: No. [169]

Q. (By Mr. Nesbett): Is your name Wayne Hubbard? A. Yes, sir.

Q. Are you a certified public accountant?

A. Yes, sir.

Q. And——

The Court: First name is?

Q. Wayne, W-a-y-n-e, is that correct?

A. That is correct.

Q. Could you have an office here in Anchorage?

A. Yes.

Q. Were you contacted by me on behalf of Stuart Tope to prepare a certain cost accounting analysis of a construction job? A. Yes.

(Testimony of Wayne Hubbard.)

Q. Did you prepare such an analysis?

A. Yes, sir.

Q. Will you look at the paper that I handed you, which is a copy of Exhibit 2? I'll hand you Exhibit 2 and ask you if you prepared that cost of operations?

A. Yes; I did.

Q. Analysis?

A. Yes; I did.

Q. Did you have the assistance of any person in preparing that? [170]

A. Yes; I had the assistance of Mr. Stuart.

Q. Mr. Stuart Tope?

A. Yes; Stuart Tope.

Q. And did you have any records furnished you by Mr. Tope?

A. Yes; I had certain records furnished by him and then I had other data furnished to me which were estimates.

Q. Do you have the data that you used to prepare that cost of operations and analysis in your file and on your work sheets there before you now?

A. Yes.

Q. Now, what records, specific records, were used to determine the number of hours of operation of a given cat and the cost of operation per hour, per day?

A. Well, mainly, I went through the payrolls which Mr. Tope indicated were for these particular cats which operated, and at the same time, in a breakdown which had been previously made as to the weekly time for each cat, which was evidently

(Testimony of Wayne Hubbard.)

their only record of the number of hours that that particular cat worked during the week.

Q. Are those payrolls in your file folder now?

A. Yes; they are. [171]

Q. Are those payrolls furnished to Tope by Oaks Construction Company payroll statements?

A. Let me look. (Looking for it.) Yes, these are a statement from Oaks Construction Company to Stuart Construction Company.

Q. Was one of those statements used in each instance with respect to each cat to determine the weekly operation schedule or amount of operation?

A. Yes; as near as it could be determined which cat that this particular person worked on at that time.

Q. Yes; now, how did you prepare the cost of fuel oil consumption on the Caterpillars for the weeks shown on your schedule?

A. Those were given to me by Mr. Stuart. It was based on an average consumption of forty gallons per day and a six-day week, with the exception of three weeks when an extra trip, whether or not used, twenty gallons a day, and the price which has been charged to the Stuart Construction by the Oaks Construction was used as an average for the price of fuel oil per gallon.

Q. Did you obtain the payroll tax and the payroll insurance tax and the union welfare fund costs shown in this analysis from the Oaks Construction Company payroll invoices? A. Yes. [172]

Q. As you remember—is this schedule which is

(Testimony of Wayne Hubbard.)

Exhibit 2 for Identification, does it cover each Caterpillar individually with a recapitulation of the total cost of operations as to each Caterpillar on page 1? A. Yes, sir.

Q. What is that total that you arrived at, based on the figures contained in the three following pages?

A. The grand total for the three cats was \$16,-698.

The Court: That's the rental?

A. That was the cost.

The Court: Now, that would cover the——

Mr. Nesbett: Pardon me, I'll ask him this question, your Honor: That would cover the cost of paying the cat operator's wages, his payroll taxes, his insurance and union welfare fund contribution, as well as the lubrication, the maintenance and Prestone needed to keep that cat operating, is that correct?

A. Yes; plus an estimation portion of parts and supplies purchased from the Northern Commercial Company, Fairbanks, of \$3,232.98.

Q. And did you go through the charges made by Northern Commercial Company in Fairbanks, made against Tope for parts furnished on that cat, in order to reach that figure? [173]

A. Yes, but it was difficult to determine that was the exact figure used on those cats at that particular time.

Q. How did you arrive at that figure?

A. Again, Mr. Stuart, I believe, gave that to me.

(Testimony of Wayne Hubbard.)

The Court: Mr. Tope?

A. Mr. Tope, I'm sorry.

Q. Then the \$16,698.00 would include the figure of \$3,232.98, which would be—which would represent the spare parts bought by Mr. Tope for the cats during this period, is that correct?

A. Yes, sir.

Q. And Mr. Tope supplied that figure to you with respect to spare parts, did he?

A. Yes, sir.

Q. Did he have invoices he was going through there? A. Yes; he did have some.

Q. Your Honor——

The Court: What is the figure, the deduction cost, I didn't——

Q. The total deduction from the twenty-five dollars per hour rental, your Honor, would be \$16,698.00. That would be what——

The Court: What was the total rentals that you claim? [174]

Q. The total rentals for all the equipment was \$53,620, your Honor; the total rentals claimed. This would be a deduction.

The Court: And your claim is for the balance, deducting the \$16,698.00?

Mr. Nesbett: We claim as to the balance subject to, as I mentioned in my opening statement, the fact that N. C. Company had, on their own, made, attempted to make an entire settlement of this thing with Oaks, themselves, which will come into evidence by the next witness.

(Testimony of Wayne Hubbard.)

The Court: Later on——

Mr. Nesbett: That is another ten thousand dollars that will have to be considered in some fashion by your Honor.

The Court: Very well.

Mr. Nesbett: I offer that in evidence now, your Honor, Exhibit 2.

The Court: Do you want to examine the witness first?

Mr. Dunn: I'd like to, please.

The Court: Very well.

Cross-Examination

By Mr. Dunn:

Q. Now, Mr. Hubbard, there is—is there any difference between the schedules 1 A, 1, 2, and 1-3, as to the [175] classification of the things itemized? In other words, they all contain payroll and on through to lubricating maintenance, don't they?

A. Yes, sir.

Q. The three schedules are identical in that respect?

A. Yes, sir.

Q. Now, with respect, then, to the three schedules, the payroll column, from what source were those figures of payment?

A. The payroll itself.

Q. The figures reflected in the payroll column on schedules 1—on schedules A-1 to A 3, inclusive, were obtained from what source, please?

A. From the source of the Oaks Construction

(Testimony of Wayne Hubbard.)

charge to the Stuart Construction Company, and which were told to me to be of the particular cats for those particular number of hours within that particular week.

Q. Did you see records that were, or purported to be, Oaks' records from which you obtained those figures?

A. Oaks' records themselves, that is to the——

Q. Or copies of them?

A. Well, it's an invoice of Oaks——

Q. And you obtained it from Oaks' invoice, is that correct? [176] A. Yes, sir.

Q. Do you have those invoices?

A. Yes, sir.

Q. May I see them, please? (The invoices were passed to him.) Perhaps I can be of a little more aid, Mr. Hubbard, I'll try to be. You begin with the week ending the 9th, January, 1954, did you not? A. I believe so, yes, sir.

Q. Well, do you have that invoice, please?

A. Week ending the 9th?

Q. Yes.

The Court: The 9th of what?

Q. January 9, 1954, your Honor.

The Court: You have copies of those invoices?

Q. I have copies of invoices and that is what I am wondering whether they're the same or not.

The Court: I understood they were invoices submitted by the defendant, by the defendant to the plaintiff?

Q. The plaintiffs submitted these invoices to the

(Testimony of Wayne Hubbard.)

witness and the plaintiff says that these are invoices of Oaks, as I understand it?

The Court: That's what I say, the Oaks—the defendant presented invoices to the plaintiff [177] and the plaintiff then submitted them to the witness.

Q. That is what I am trying to find out, whether or not those are the invoices, your Honor?

A. Yes; I have it here.

Q. May I see that one, please? (The invoice was passed to him.)

The Court: Mr. Nesbett, does your Exhibit No. 2 contain a statement of each invoice that—the amount of each invoice or just the totals?

Mr. Nesbett: It doesn't identify the invoice by any number.

The Court: But does it show the figures, the amount of each invoice that is on the cost side?

Mr. Nesbett: It would if you use schedules A-1, 2, and 3, and consider them all, I guess; they had all been on one invoice for one week.

Mr. Dunn: I return this to you now, Mr. Hubbard, and ask you to keep it in front of you. I invite your attention to your Schedule 1 A and ask you whether or not that is concerned with a cat designated "S 23"?

A. Yes, sir.

Q. Now, comparing your Schedule 1 A with the invoice of Oaks, who operated Cat S 23? [178]

A. I couldn't tell you.

Q. Can't you, Mr. Hubbard? I could tell you.

(Testimony of Wayne Hubbard.)

A. Could you? Well, it could have been Wilcox.

Q. How much money did Mr. Wilcox make?

A. \$249.93.

Q. And that is the amount you show on the payroll column for Schedule A 1, is that correct?

A. Yes, sir.

Q. Now, I invite your attention to Schedule A 3, for the week ending January 9.

A. Yes, sir.

Q. And where did you get that figure?

A. That would be based on cat operator's wages for fifty-six hours.

Q. On Cat S 24? A. Yes, sir.

Q. So it could have been a combination of Allison and Morgan, in order to arrive at the \$249.00?

A. Yes, sir.

Q. Let me have your invoice for the period ending January 9, if you will, please? Your Honor, so we can keep this record straight, I'd like to have this marked for identification.

The Court: Does it correspond with your [179] invoice?

Q. Yes, sir. I would like to have that marked for identification, please.

The Court: Is it your exhibit?

Q. It will have to be, I offered it.

The Clerk: Defendant's Exhibit B.

Mr. Dunn: What is A?

The Clerk: Well, it is this.

Mr. Dunn: Oh, that is right, I forgot that.

Q. (By Mr. Dunn): I'll return what is now

(Testimony of Wayne Hubbard.)

Defendant's Exhibit B for Identification to you. Now, we have established, have we not, that Wilcox was operating S 23?

A. Well, I don't know——

Q. For the week ending January 9?

A. I don't know how you could establish that.

The Court: Does it make any difference who was operating; the question is, how much was paid, what the invoice showed?

Q. All right, that's quite true, sir.

Well, have we established then that the operator of S 23, according to your Schedule A, was paid \$249.93 for the week ending January 9, 1954?

A. Yes, sir, for that portion that he was working for those fifty-six hours.

Q. And you get that information from Oaks, invoice, [180] which is now Defendant's Exhibit B, do you not?

A. No; based on the number of cat hours by the operator's time, rate per hour.

Q. Well, maybe I'm wasting time here, but I understood you to say, Mr. Hubbard, that you got those figures from these invoices of Oaks?

A. That is true. Your hourly rate and the hourly rate of the cat operator.

Q. As shown by Oaks' invoice?

A. Yes, sir.

Q. Well, is not the Oaks' invoice for the week ending January 9, 1954, the one you now have which has been marked Defendant's Exhibit B?

A. Well, that wouldn't exactly be, the invoice

(Testimony of Wayne Hubbard.)

would not exactly be or tie in with the operation of three cats.

Q. Well, then, you didn't get the information from the Oaks' invoices, is that right?

A. As to which cat that they operated on and the number of hours that they operated on each cat, no, sir; it doesn't indicate that.

The Court: I thought it was made clear, he took the time of the operators and then he computed the time that the cat was used, the way in which he derived at the operation of the cats, [181] as I understand it.

Q. But I understood all of that came from Oaks' invoice?

The Court: No, sir; the testimony was, as I remember, it was that he took the time—took Mr. Oaks' invoices as to the time of the cat operator and then he computed the time that the cat was in use.

Mr. Nesbett: With one qualification, your Honor, Mr. Tope testified that he told Mr. Hubbard from the payroll that Wilcox, for example, was running S 23 so that he would know which payroll, for example, person to be allocated to each cat.

The Court: Yes; that's the way I understood it.

Mr. Dunn: Well, where did you get the hourly rate from which the payroll column of your Schedule A's were computed?

A. They were computed from the hourly rate and submitted on time slips of the Oaks Construction Company.

(Testimony of Wayne Hubbard.)

Q. All right, where is the time slip for the week ending January 9, 1954?

A. Right here, I guess.

Q. What? A. Where is it? [182]

Q. Yes. A. Here, sir, right here.

Q. Well, now, what is that?

A. The invoice and the name of the men, the day, the number of hours, the hourly rate, and overtime and the gross pay.

Q. Well, now, are you reading from Defendant's Exhibit B?

A. Yes, sir; this is the one that you just handed me back.

Q. Then you got the hourly rate from Defendant's B, which is an invoice of Oaks, is that correct? A. Yes, sir.

Q. Well, what is the hourly rate for the cat in your Schedule A 1 on Plaintiff's Exhibit 2, which is there designated S 23; what's the hourly rate for that cat? A. On which one now?

Q. S 23, your Schedule A 1?

A. The hourly rate for straight time is 5.318; the overtime—I'm sorry, it's the other way—the regular rate is 3.55 and the regular time is 5.318.

Q. All right. Now, how many hours did Cat 23 work according to Defendant's Exhibit B?

A. 56 hours. [183]

Q. And according to Defendant's Exhibit B, did that not indicate Mr. Wilcox ran that Cat S 23?

A. Well, I'm not in a position to say.

(Testimony of Wayne Hubbard.)

Q. Well, he is the only one that made \$249.93, isn't he?

A. But the other two cats are likewise with 56 hours each. And there—which would be the same payroll, would be at the same rate of labor cost, would be the same for the other two cats.

Q. Well, then, how do you account for the fact that the other men didn't make as much money as Wilcox according to Defendant's Exhibit B?

A. Well, they did, Allison made more.

Q. And he ran a cat, didn't he?

A. Yes.

Q. And how about Morgan, what did he do?

A. He ran a cat.

Q. And how did he come out money-wise?

A. Well, which one, Morgan?

Q. Yes. A. Well, he came out \$198.53.

Q. He came out the poorest of the three. That's true, isn't it? He made the least? A. Yes.

Q. Then, why do you show on your schedules A 1, 2, and [184] 3 of Plaintiff's Exhibit 3, the same amount for each of the three cats for the week ending January 9, 1954; namely, \$249.93?

A. Oh, well, as I stated previously, I believe that those were the number of hours given to me that the cat operated.

Q. By whom? Who gave you those hours?

A. Mr. Tope.

Q. Then you got—now, let me see if I understand you. Is this true, that you got the rate, the

(Testimony of Wayne Hubbard.)

hourly rate from Oaks' invoices, but you got the hours worked from what Tope said?

A. Yes, sir.

Q. Now, is that right? A. Yes, sir.

Q. Well, now, all of these costs then—is this true, that all of the costs reflected on these schedules for fuel oil, oil, prestone, and lubricating maintenance are based upon the payroll column?

A. Based on the payroll column?

Q. Yes. A. No.

Q. They're not?

A. No; they're based on the number of hours that each cat worked each week. [185]

Q. Well, isn't the payroll column based on a number of hours the cat worked each week?

A. Yes, sir.

Q. So it's the same thing, isn't it?

A. No, no.

Q. Well, is there a difference? A. Yes.

Q. Between the hours, working hours of the cat?

A. No.

Q. Used in computing the payroll column and used in computing the other column?

A. Not a bit.

Q. Your—everything is based on the number of hours used so it won't be the fuel oil as against the payroll or the oil against the fuel oil; but it is all based on the number of hours.

A. It's based upon the number of hours.

Q. And Mr. Tope is the one who gave you the number of hours?

(Testimony of Wayne Hubbard.)

A. Yes; that is where I obtained those figures.

Q. Well, is it not true then, Mr. Hubbard, that this is not an accounting sheet at all?

It is merely Mr. Tope's claim as to how many hours these cats worked; isn't that what it [186] amounts to?

A. Well, the number of hours and the costs of operating these particular cats, yes.

Q. Based on the number of hours that Mr. Tope said they were? A. Yes.

Q. That's it, isn't it? A. Yes.

Q. Now, then, Mr. Hubbard, just assume that the hours given in the payroll column on your Schedule A 1 to A 3, inclusive, of Plaintiff's Exhibit 2 are accurate, with respect to the number of hours that the cat skinner operated or worked; assume they are accurate with respect to the number of hours worked by the operator, that wouldn't tell you anything, would it; as to how many hours the cat ran, isn't that true?

A. (No response.)

Q. Well, you don't need to answer it; the answer is obvious. I have no further questions, your Honor.

The Court: Is that all?

(Testimony of Wayne Hubbard.)

Redirect Examination

By Mr. Nesbett:

Q. Mr. Hubbard, didn't Mr. Tope tell you that Wilcox or Morgan, or whosever name was shown on any weekly payroll was the operator of such and such [187] a cat, designating it either S 23, 22, or 24? A. I don't recollect that.

Q. Do you know how you assigned the time per week for each cat? How did you arrive at it; from those records and with Tope's assistance, of course?

A. Yes; the number——

Mr. Dunn: Your Honor, I got to object to that because that is just—he certainly has answered that. That was the whole point of my cross-examination, how he arrived at the number of hours.

The Court: There was variance in the testimony so I think counsel has a right to clear it up. I assumed at first that he took the number of hours worked by an operator and then on that computed the hours in which the cat was used.

Mr. Nesbett: That is what I understood he did, but I am asking, I don't know whether he wound up saying——

A. Well, you can't actually from your payrolls, you can't tell how many hours your cat worked.

Q. (By Mr. Nesbett): Well, now, I want to ask you, did Mr. Tope tell you that for a given week Wilcox, for example, was driving such and such a cat and that, therefore, if [188] he was paid

(Testimony of Wayne Hubbard.)

for so many hours, the cat ran so many hours that week?

A. I don't recollect that, Mr. Nesbett.

Q. How did you receive the number of hours per week that you assigned to a given cat?

A. Well, I received—I got them from someplace, but I thought it was some——

Q. Where did you jot them down, on your work sheet? A. Yes.

Q. Under what heading?

A. Oh, here, "Time submitted per Buell A. Nesbett to Dunn." That is where I took the time.

Q. You took the time then from—may I have Exhibit 3? I show you Exhibit 3, does that refresh your recollection to any extent so that you can tell the Court how you arrived at the number of hours a given cat operated in a given week?

A. Yes; I took it from this exhibit, here.

Q. From the pages appended to Exhibit 3?

A. Yes.

Q. And who furnished you that?

A. You did.

Q. And did Mr. Tope bring it over to you when you started work on this job?

A. I believe so. [189]

Q. Very well. Look at—Mr. Hubbard, will you please look at Exhibit 2? A. Yes.

Q. And what is the total number of hours that you have for Cat S 23, for the week ending January 9? A. 56.

Q. And for the week ending January 16?

(Testimony of Wayne Hubbard.)

A. 56.

Q. For Cat S22 for the week ending January 9?

A. 56.

Q. Did Mr. Tope tell you that, when he gave you the hours per week per cat that he had used the payroll names to assign the number of hours to each cat for each week? Do you know how he got that—how the figures were arrived at that you got as representing the hours per week, per cat?

A. Well, from the actual payroll itself, you couldn't, it wasn't indicated on there which cat.

Q. You mean it was simply names?

A. It's simply names, yes.

Q. That's all.

Mr. Dunn: I object to the admissibility of this—if I understand, and I admit I may not, but if I understand the testimony here, this instrument is not a—the fruit of accounting. It's [190] a compilation of information that Mr. Tope gave this accountant.

The Court: Yes.

Mr. Dunn: It's nothing but a self-serving thing; his testimony is already in the record; I don't believe it's admissible.

The Court: Well, it is admissible as to his claim, Mr. Tope's claim, the Plaintiff's claim, that is his computation so whatever it's worth, he'd have a right to present it here.

Mr. Dunn: Do I understand your Honor's ruling, now, to be that my objection goes only to the weight and not the admissibility of the exhibit?

(Testimony of Wayne Hubbard.)

The Court: That's right.

Mr. Dunn: Thank you.

The Court: So No. 2 will be admitted in evidence for whatever it is worth. Now, are you ready to resume your cross-examination?

Mr. Dunn: Yes, sir.

STUART E. TOPE

resumes the stand.

Cross-Examination

By Mr. Dunn:

Q. Mr. Tope, did you find the stock certificates?

A. Beg your pardon?

Q. Did you find the stock certificates?

A. Yes. [191]

Q. May I see them, please? (Mr. Tope passed them to him.) How many are there here that you are handing me? A. Two.

Q. Are these the only ones that were in your safety deposit box?

A. They are the only ones in the safety deposit box.

Q. They were the only ones you found then?

A. Beg your pardon?

Q. They were the only ones you found there?

A. They are the only ones there.

Q. Well, they're not there now, is that the only ones that were there when you went there during the noon hour? A. I didn't go there.

Q. Who did? A. My wife went there.

(Testimony of Stuart E. Tope.)

Q. And you don't know, is that right?

A. Beg your pardon?

Q. And you don't know if there are any others there or not, is that true?

A. No; I just don't know.

Q. May I see Plaintiff's Exhibit 4, please?

The Court: Are those the rental purchase contracts?

Q. Yes, sir. Mr. Tope, what kind of a [192] financial position were you in when you were negotiating this contract on behalf of Stuart Construction Company, if you wish to distinguish between them, and Oaks Construction Company?

A. You will have to repeat that; I didn't hear the first of your question.

Q. At the time of the negotiation of Plaintiff's Exhibit 1, this contract——

A. Yes.

Q. ——what kind of financial shape were you in?

A. Very poorly.

Q. How about Stuart Construction Company, what kind of financial shape was it in?

A. About the same.

Q. How do you account for the fact that you got such extensive credit with the N. C. Company?

A. The equipment worked ever since I had it up until the time that that contract was signed; I assigned all monies that that equipment made to the N. C. Company. There was a job done with the Monard Construction Company which I assigned to the N. C. Company the full amount, and the other was with the Oaks Construction Company,

(Testimony of Stuart E. Tope.)

on his Salana job, which I assigned all of it to the N. C. Company, and the money was paid to [193] the N. C. Company already.

Q. Was that true from the time you signed the first of those rental purchase agreements?

A. That is true.

Q. Well, now, what work was it that was assigned to the N. C. Company, or under the proceeds of what work? There was the Salana.

A. Salana?

Q. Yes; there was the Salana job with Oaks?

A. Yes.

Q. And when was that?

A. That was in the summer of 1953.

Q. About how long, between what period of time did that job last?

A. I just couldn't tell you the exact time.

Q. I realize that.

A. I believe it started in August and September—started in August, then one of the cats went to Tonsina for MK for a very short period of two weeks, I believe. And the other cat was brought into Anchorage and Mr. Oaks used it over here on a job on Tudor Road.

Q. Well, now, you are being more than generous, Mr. Tope, with your information, but just how long did this Salana job last? It began in August of 1953, and [194] terminated approximately when?

A. I don't know when the job began, because the cat—the job had already been started before my equipment was moved in there.

(Testimony of Stuart E. Tope.)

Q. I mean your work on the job began approximately in August of 1953? Did you not so testify?

A. Yes.

Q. And your work on the job continued how long?

A. I don't know; I just leased the cats to him; I had no part of the contract.

Q. Well, how long did you lease to him, whoever it was, from when to when?

A. I can't remember the date; I just don't know.

Q. You don't have any idea how long it was?

A. I just do not know, no, sir.

Q. And you don't have any idea how much money was paid N. C. Company, do you?

A. I could go back through records and find it.

Q. Do you have the records here?

A. They should be.

Q. I don't doubt that.

A. I think it's on that financial statement that is made there, I believe.

Q. Which one is that?

A. The financial statement was made in 1954, I believe. [195]

Q. Which one are you talking about, the one Morlan prepared? A. Yes.

Q. If that will help you, that is a copy of it, isn't it? I believe you have the original of it, do you not, if you prefer to refer to that?

A. Yes.

Q. Would you prefer to refer to the original?

(Testimony of Stuart E. Tope.)

A. I believe Mr. Nesbett has it there.

Q. I imagine he does. It doesn't show on this statement. Are you questioning this now, the authenticity of that statement that I showed you?

A. You will have to speak a little plainer English to me.

Q. Do you believe that is a true statement? Are you questioning whether or not that is a true copy of the original?

A. No; I am not questioning it, no.

Q. Do you believe it is a true copy?

A. I am pretty sure it is, yes.

Q. Thank you.

And then you had a job with MK, did you?

A. No; I leased the cat for a couple of weeks; they wanted it for just a very short time.

Q. About a 2-week job with MK?

A. Yes. [196]

Q. Well, now, with this Salana matter and the MK matter, the 2-week matter, was that the only income from these cats?

A. No; there was one other short-time job with McLaughlin in Tok, on the Tok Cut-off.

Q. About how short was that job?

A. I believe I received \$900.00 on that, I'm not positive of that.

Q. Is that the only work that that equipment had then, from the time you got it until you went to work for Oaks?

A. In Big Delta, I was working for the Munter Construction Company and I was on their payroll

(Testimony of Stuart E. Tope.)

as an operator, operating one of these cats, and the rental was assigned to the N. C. Company, but it was not deducted. My wages was not deducted from the rental. And at night, I would walk this cat across a river up there and do a little clearing at night so that I could meet my expenses. In other words, I was working about 18 hours a day.

Q. Well, how long did you work—was this Munter, did you say? A. Yes; Munter.

Q. How long did you work for Munter?

A. I think it was around about a two months' job, two and [197] one-half, something like that. The total amount of the cat rental to the N. C. Company was around thirty-three hundred dollars, and if I remember correctly, that amount of assigned monies from the Salana job by Mr. Oaks was paid to the N. C. Company, fifty-six hundred dollars, I believe, something in there.

Q. Well, then, all together, the—from the time you signed these rental purchase agreements until you went to work for Oaks, you received, or rather the N. C. Company received approximately \$8,900.00, is that right?

A. Somewhere in there.

Q. Now, then, during that same period of time, you worked two months for Munter, is that correct?

A. That's what I say, I just can't—I think it was a month, six weeks, two months, somewhere in there; it was over a month's time.

(Testimony of Stuart E. Tope.)

Q. Did you, as an individual, work any place else during this same period of time?

A. When I was working for Munter?

Q. No; from the time that you signed these rental purchase agreements, the earliest of them with the N. C. Company, and the time you went to work for Oaks, did you work for anyone besides Munter? [198]

A. No; I just worked for—I just leased the equipment to Mr. Oaks. I was not——

Q. And that was all assigned to the N. C. Company, wasn't it? A. Yes, sir.

Q. Now, when was this hourly rate that you allege Oaks said he'd pay you, agreed upon, Mr. Tope? A. I beg your pardon?

Q. When did you and Oaks agree upon the hourly rate of rental that you claim you and he did agree to?

A. We did not agree to any rental or hourly rental. He just said to go up there and work on an hourly basis and if anyone asked him—anybody on the pipeline asked me who I was working for, I was working for him.

Q. Did anybody ask you? A. No.

Q. Well, you do testify, do you not, that Oaks agreed that you would be paid for your equipment on an hourly basis?

A. Yes, but we didn't agree to any hourly rate.

Q. You agreed on an hourly basis, but not an hourly rate?

(Testimony of Stuart E. Tope.)

A. Hourly basis would be the same thing, would it not?

Q. Well, I don't know; I'm trying to get information [199] from you. Do you now testify that Oaks agreed to pay you for your equipment at so much an hour?

A. Well, I took it for granted that when he said to go up there and work on an hourly basis that he would pay me on an hourly basis, yes.

Q. All right, then Oaks said, "I'll pay you on an hourly basis," and you said, in effect, "I accept." Is that correct?

A. Well, I don't know whether that was said or not, I just don't recall what was said then.

Q. Well, did you refuse his offer to be paid on an hourly basis? A. No; I didn't.

Q. Then you did accept? A. Yes.

Q. Now, when was that hourly basis agreed upon? A. Some time in December.

Q. Of 1953? A. That is correct.

Q. How long before Christmas was it?

A. Well, I believe it was talked about between the—some time after the first of the year—or after the first of the month, after the first of December.

Q. Well, that would necessarily follow that it was in December, Mr. Tope? [200]

A. Yes, but some time after the first of December. I should say between the 1st and 15th of December.

Q. Between the 1st and 15th? A. I'd say.

Q. Now, do I understand your testimony cor-

(Testimony of Stuart E. Tope.)

rectly to the effect that while an hourly basis was agreed upon, no hourly rate was agreed upon? In other words, is it your testimony that Oaks said, "I'll pay you by the hour," and you agreed to it, but nobody said how much an hour?

A. Only on the contract; on the contract it was agreed as an eighteen dollar an hour, as long as it went along with the rest of the contract, yes.

Q. Yes what? I mean I don't understand your answer at all, Mr. Tope. My question is this: Is it your testimony that Oaks offered to pay you on an hourly basis and that you accepted it but that no hourly rate was agreed upon?

A. I said on the contract.

Q. I know what you said.

A. There is an eighteen dollar an hour, per hour on the contract and that eighteen dollars went along with the contract because it——

Q. Well, you did know, didn't you, you didn't go [201] along with the contract?

A. Pardon?

Q. You didn't go along with the contract, did you?

A. No; I didn't.

Q. All right. I'm talking about you.

A. We based that—well——

Q. Look, Mr. Tope, it looks to me like we are making a mountain out of a mole hill. The only thing I'm asking you is, did you and Oaks agree upon a figure?

A. We did not.

Q. In dollars and cents to be paid per hour?

A. We did not.

(Testimony of Stuart E. Tope.)

The Court: Are you referring now to his wages, that \$250.00 a week, or——

Q. No, sir; I'm referring to the rental.

The Court: This equipment?

Q. Equipment rental, yes.

So you agreed that you had been paid by the hour for this equipment, but not how much an hour, is that right? A. That is right.

Q. Now, did you make any agreement as to who'd pay for the maintenance on the equipment?

A. No; we didn't. [202]

Q. Did you make any agreement as to who would pay for fuel oil? A. Yes.

Q. What did you agree upon on the fuel oil?

A. Mr. Oaks said he would pay all the bills.

Q. Except maintenance?

A. He didn't—I don't believe he was—maintenance is—wasn't mentioned.

Q. Fuel oil, was fuel oil mentioned?

A. That is, to operate the cat you had to have fuel oil.

Q. I agree with that. Was fuel oil mentioned?

A. Yes, it was.

Q. And what was said about fuel oil?

A. That he'd pay all the bills.

Q. Is that the only mention that was made to fuel oil? A. As far as I know.

Q. Was any mention made of lubricants?

A. I don't believe so.

Q. Was any mention made about hauling the cats up there?

(Testimony of Stuart E. Tope.)

A. He made some kind of a deal with Mr. Tony Gillespie——

Q. No, now, I'm talking about a deal that you say you made with Oaks? [203]

Mr. Nesbett: I object, let the witness answer the question, your Honor.

Mr. Dunn: That is all I want him to do, your Honor.

Mr. Nesbett: He interrupted before——

The Court: His answer was there was some sort of arrangement made with somebody.

Mr. Dunn: With Gillespie, your Honor. It is obviously not responsive because my question is related to the contract that he alleges he made with Oaks.

The Court: Now, is this the contract in modification of the main contract?

Mr. Dunn: I don't know; I am trying to find out just what this man does contend.

The Court: Well, he hadn't finished his answer and it may be that the answer would be that the rest of it would answer your question. Had you finished your answer?

A. He made some kind of a deal with Mr. Gillespie to haul that equipment up there, but what deal he made with him, I do not know, but there was a charge to be made back to me for the hauling of the cats to Tok.

Q. You were to pay then according to the agreement [204] you say you had with Oaks, you were to pay for getting the cats on the job?

(Testimony of Stuart E. Tope.)

A. That is correct.

Q. Now, who was going to furnish the men to run them? A. Mr. Oaks.

Q. And how much was he going to pay them, pay the man?

A. He would have to pay the regular scale.

Q. What did he agree with you on?

A. He didn't agree on anything with me.

Q. He didn't agree with you one way or the other on that? A. No, sir.

Q. Now, let me ask you—let me go over this, I want to be sure I understand it before I start asking you questions on it. Now, what I'm interested in is the contract that you claim you made with Mr. Oaks. And by "you" I mean Stuart E. Tope.

Mr. Nesbett: I will object to long speeches to the witness; after all, he has an opportunity to ask him questions.

The Court: The question ought to be asked and see if the witness can answer it.

Mr. Dunn: Is this the contract that [205] you made with Mr. Oaks, that you would furnish him three cats, a 2½-ton truck, a Ford station wagon, and a pickup at so much an hour, although no hourly rate was agreed upon, nor was any agreement made as to who would maintain the equipment; nor was any agreement made as to fuel oil, except that Oaks said he'd pay all the oil bills, nor was any agreement made with respect to lubricants, except that Oaks said he would pay all the bills;

(Testimony of Stuart E. Tope.)

that you would pay to get the cats on the job and that Oaks would furnish the men?

A. You will have to repeat.

Mr. Nesbett: I object to the question as too long, compound, and almost unintelligible.

The Court: Well, I think I see what is the object of the inquiry; there was an original contract and apparently the parties started on that contract. The terms of the contract were such, this plaintiff take over the clearing of the space there for probably one hundred miles. Now then, apparently neither party proceeded on that contract. The plaintiff had not been able to give bond and then there must have been some sort of an understanding, or else the suit [206] proceeds in a sum set, that is an assumption that since the plaintiff and the defendant used the cats, used the equipment, that he is bound to pay something for it, and you fixed it at around twenty-five dollars, and the testimony showed that. Now, counsel is trying, even deferring to find out whether or not there was an oral contract independent of this written contract. I think that is what you are after.

Mr. Dunn: I would like to restate that; I would like to find out if this witness claims there was an oral contract.

The Court: That's right, exactly, for the use of the cats independently of this original contract, but apparently was never carried out.

Mr. Nesbett: The reason I objected to the ques-

(Testimony of Stuart E. Tope.)

tion, your Honor, it was probably fifteen or sixteen lines long and incorporated in one question.

The Court: Suppose we shorten the question and find out whether or not there was any sort of an understanding between the parties independently of this written contract. He would have a right to modify the written contract in an oral agreement, if they wanted to, as far as I know, unless the law in the Territory forbids that. [207]

Q. (By Mr. Dunn): I'll shorten it, your Honor; I was actually trying to help the witness. What were the terms of the contract made between you and Oaks? A. Orally?

Q. Did you make any contract with him besides an oral contract?

A. We had—Mr. Oaks and I, when we first sit down to that contract—

Q. First, Mr. Tope, answer the other question. Did you make any contract with him besides an oral contract?

A. There was a signed contract.

The Court: Did you say besides the oral contract?

Q. Besides an oral contract, yes.

A. I signed a contract, yes.

Q. You are a party to that contract?

A. Yes.

Q. Is that the one that is in evidence as Plaintiff's Exhibit 1? A. That is correct.

Q. All right, now ignore that one. Did you make any oral contract with Mr. Oaks?

(Testimony of Stuart E. Tope.)

A. At the time that contract was signed? [208]

Q. Now, I believe you can answer that yes or no.

The Court: Well, subsequently to signing the contract, the original contract—now, if I may interpolate here, the original contract was a written contract; it was never carried out. Now, your point is that, after that was there an oral contract between the parties. Is that what you wanted? If they made an oral contract before it was merged into the written contract? They would have a right subsequently to modify it orally if they wanted to. Now, the question is: Did they make an oral contract subsequent to the signing of that original written contract? Is that what you desire to know?

(No response to the Court's question.)

The Court: You bring out the questions in your own way, not in my way.

Mr. Dunn: (Long pause): My question, your Honor, is whether or not there was an oral contract between Tope and Oaks Construction Company. Now, this written contract, I contend, was between Tope and Oaks Construction Company only by virtue of there being no difference between Stuart Construction Company and Mr. Tope, individually. [209]

The Court: Yes, I understand that.

Mr. Dunn: And——

The Court: Suppose you go ahead and ask the witness in your way to bring out whatever information you want.

Court stands in recess for ten minutes.

(Testimony of Stuart E. Tope.)

(A ten minute recess was taken at 3:30 p.m.)

After Recess

Mr. Dunn: I think I had best make an explanatory statement or possibly more accurately answer the question that you asked me, as to what I am trying to establish.

The Court: Well——

Mr. Dunn: In this line of questioning with the witness——

The Court: Maybe I can clarify it. We are not getting anywhere in the case. Now, as I understand, counsel has abandoned this written contract and proceeding upon the theory of quantum meruit.

Mr. Dunn: Oh, here, yes.

The Court: Yes. Now then the only question here is whether there is any understanding between the plaintiff and the defendant as to the right of the—as to the use of plaintiff's equipment [210] by the defendant; that is the only issue in the case.

Mr. Dunn: Well——

The Court: Whether there is any understanding, and if there wasn't, whether he went on and used it—and I understand that counsel is, they're suing upon basis of quantum meruit—whether the plaintiff, whether they're entitled to anything. So that makes the issue a very simple one. And he, I understand the witness is confused as to whether there was any oral understanding, and it would be a simple matter to ask whether there was any under-

(Testimony of Stuart E. Tope.)

standing between him and the defendant for the use of the equipment by the defendant. The defendant apparently took charge of it; that is his testimony; I don't know what the defendant will show, but the defendant took charge of it. Now, when he took charge of the equipment apparently it was supposed that ultimately this bond would be executed, that is, whether the condition precedent would be observed. Now, the question is, and the only question to this witness to answer is: Whether there was an understanding that he was to be compensated for the use of this equipment. He [211] was on the payroll himself at \$250.00 per week; his equipment was used and whether there was an understanding, or no understanding, at least that is—up to this time that is the question in the case.

Mr. Dunn: Well, your Honor, our contention, you see, is this: Of course, we haven't proceeded to prove our case.

The Court: No, sir, I understand that; I'm only speaking from the plaintiff's viewpoint, as to what he is saying about it.

Mr. Dunn: Well, you see, he has said that this written contract is an nullity. Now, we don't agree with that.

The Court: Well, exactly, so you go on and try the case and let's get along with it, because we are using a lot of time here and not getting anywhere.

Mr. Dunn: Well, I just thought I could be of help.

(Testimony of Stuart E. Tope.)

The Court: I thought I could be of help, but apparently I can't, so I'd like to proceed.

Q. (By Mr. Dunn): When did you talk to Mr. Olday about getting a [212] bond?

A. Sometime in December.

Q. When in December?

A. It was before Christmas.

Q. Can you place it any more accurately than that?

A. I cannot.

Q. Between the 1st and what date?

A. I can't tell you that, because I just don't remember.

Q. Was it before or after the written contract was signed?

A. I can't tell you.

The Court: He told us one time before that he thought at one time this contract was signed on December 17, 1953, as I remember. Before, I thought the witness said he talked to Mr. Olday before he signed the bond about that—the condition precedent. However, he says he doesn't remember and he is the one that should testify, not me.

Q. Did you testify on direct examination that you talked to Olday before you signed this contract on December 17?

A. I believe that is correct, now that I think of it, yes.

Q. You're pretty sure of that now? [213]

A. I'm pretty sure, yes.

Q. Did you testify on direct examination to the effect that you had a "run-in" with Hager and you "went to bat," using the term of "going to

(Testimony of Stuart E. Tope.)

bat," was arguing it out? Did you so testify on direct examination? A. Yes.

Q. What did you mean?

A. Well, that's arguing about it.

Q. Well, did you have much trouble with Hager?

A. Not a whole lot.

Q. What was the trouble about?

A. Well, he was running the job and that was it.

Q. You had trouble with him over that?

A. Yes, sir.

Q. When you say, "went to bat" do you mean that you merely argued with him over who was going to run the job?

A. Well, the way the operation was going——

Q. You argued with him then over the way the operation was going? A. Correct.

Q. Well, how did you think it should go?

A. Well, if I was allowed to run the job, I think I could have made it go a whole lot faster. [214]

Q. You thought you were a better man for the job than Hager?

A. After seeing his operation, yes.

Q. I take it, you didn't think very much of Hager?

A. Well, he's all right in his place, I guess.

Q. But that wasn't his place?

A. I don't believe it was.

Q. Well, didn't you say that you had so much trouble with Hager that you took the matter up with Oaks? A. Yes.

(Testimony of Stuart E. Tope.)

Q. Was that, again, over who was going to run the job?

A. It was—I just told Hager who was going to run the job and that was it.

Q. That is not what I asked you. What I asked you was whether or not the matter you took up with Oaks was the question of who was going to run the job? A. That's right.

Q. And you felt you should?

A. Well, I thought I should, yes, being foreman.

Q. Were you glad when Hager left?

A. I won't say that, no.

Q. Did you testify on direct examination that when Abbott came on the job things were just the same [215] as they were when Hager was on the job? A. Just about the same.

Q. Did you have to "go to bat" with Abbott too?

A. I gave up from there, when Abbott came on the job.

Q. Then, you didn't have to "go to bat" with Abbott? A. There was no use.

Q. Well, did you have to—— A. No.

Q. You didn't then? A. No.

Q. Did you have any words with Abbott?

A. Not that I can recall.

Q. You got along fine with him, then?

A. As far as I know, yes.

Q. Hager was the only one that you had any trouble with? A. That's right.

Q. How about Mr. Crawford?

A. I got along with him to a point, yes.

(Testimony of Stuart E. Tope.)

Q. What point was that?

A. Well, that was after the job was over.

Q. You got along fine all through the job?

A. Yes, I wouldn't say real fine, we argued considerably.

Q. What did you argue about? [216]

A. Oh, the berm, mostly, of tramping the berm down. I asked him to be able to move up into a better area around this rocky area and he refused to let me go.

Q. You say you argued considerably with him?

A. Yes.

Q. How did you think that right of way should be cleared, Mr. Tope?

A. At one time I suggested to Mr. Noonan that the berm should have been piled.

Q. Well, now, just a minute, now my question is: How did you think the right of way should be cleared? I don't care who you told about it, I just want to know how you think it should be cleared?

A. It should have been—the berm should have been made and—well they should have slicked out thirty feet of that run right of way and the debris was to be piled in a berm, but not walked down, tramped on, in other words; and that should have been done all the way through the whole thing until the summer time and then started back and walked your berm down. The way it was done, it was put into a berm with all this snow in there and this tundra and the tundra [217] acted as an insulation and I went up there two years later and uncovered a pile and there was snow still under it.

(Testimony of Stuart E. Tope.)

Q. How did you think that overburden should be knocked down? Anything wrong with the way they did that; you objected to the way they piled it upright?

A. Well, the way that they asked you to walk it down with the equipment when you couldn't even get up on the piles.

Q. You objected to the packing, did you object to anything else? A. Yes.

Q. What?

A. I objected to working in that rock pile and going around to a better area and then coming back and working that when the snow was melted down, yes, I did that.

Q. Did you have any special ideas on how to get that overburden off?

A. Well, there was one way of doing it and that was just with the cats.

Q. Well, you can——

A. You mean in the rocky areas, is that what you are referring to? [218]

Q. No, I am speaking of the over all section.

A. Just with the cats is all.

Q. Well, aren't there different ways of using the cats?

A. Yes, there are. You could have walked it down and then angled your blades and pushed it off to the sides.

Q. What do you mean——

A. And you could have taken it and just knocked it over as you went and pushed it off to the side.

(Testimony of Stuart E. Tope.)

Q. In any event you used the blades to knock it down? A. That's right.

Q. Did you place a bid on this section of the line? A. Did I place a bid on it?

Q. Yes. A. Yes, I think I did.

Q. How much did you bid?

A. Six and a half cents a foot.

Q. Did you bid it on any particular section or did you just bid for a hundred miles?

A. I bid on the section of between Tog and Big Delta.

Q. The section you got?

A. Yes, 96 miles, I believe. [219]

Q. How did you come to choose that section?

A. Well, at first, they thought it was a much easier section to do.

Q. Well, how did you come——

A. Well, that's exactly what I'm saying. I figured that that was a pretty easy section to go through.

Q. You thought it was easy?

A. Yes, and I walked up part of it, and flew over it once and it didn't look too bad, but I run into complications that was in the rocky area.

Q. Well, now, did you fly over the rest of it in choosing this particular section?

A. No, I didn't.

Q. This is the only section you flew over?

A. That's right.

Q. Well, I don't understand that, Mr. Tope. If you were trying to pick the easiest section, why did

(Testimony of Stuart E. Tope.)

you fly over just one? A. Pardon?

Q. If you were trying to pick an easy section, why did you fly over just one?

A. Just once?

Q. Just one section?

A. Just one section? [220]

Q. Yes.

A. Well, because I was—Mr. Oaks told me that would be the easiest section on the whole line.

Q. So that is the reason you chose it?

A. It's possible.

Q. Is it? A. Not altogether.

Q. Now, what milepost did you begin?

A. I do not know.

Q. It was Tok, was it not?

A. Yes, it was a few miles out of Tok.

Q. Which way? A. North.

Q. Northwest?

A. Yes, at the start of the job it would be northwest, yes.

Q. You said you had 96 miles?

A. I believe that is what was on the plans, yes.

Q. And you began about how many miles northwest of Tok?

A. At Tok Junction—I believe there was around about five or six miles; I couldn't tell you exactly.

Q. And how far did you go before you hit this rocky area?

A. Around twelve to fourteen miles, somewhere in there. [221]

Q. And didn't you testify that that continued

(Testimony of Stuart E. Tope.)

for about five miles? A. The rocky area?

Q. Yes.

A. No, I believe I said it went longer than that. I figured it was around seventeen miles.

Q. Is that your testimony now? How long was the rocky area? A. I'd say 17 miles.

Q. And that ended about where?

A. Robinson River, maybe just a little beyond.

Q. Where is Robinson River with respect to Dot Lake?

A. Well, Dot Lake is about 50 miles from Tok Junction—50 or 55, somewhere in there.

Q. Well, did you clear from where you started and worked west of Tok Junction and work all the way to Dot Lake?

A. One piece of equipment went on into Dot Lake.

Q. By the time you got to Dot Lake you only had one cat left? A. That's right.

Q. But did you clear that area from Tok Junction to Dot Lake?

A. It was cleared, yes. [222]

Q. I know it was cleared, but did you clear it?

A. Well, I just don't understand your question; I really don't.

Q. Did you clear the area between Tok Junction or about five miles northwest of Tok Junction and Dot Lake?

A. Well, there was one cat that broke down and I had only one cat left and they brought some more cats in and Mr. Abbott was running that job.

(Testimony of Stuart E. Tope.)

Q. I'll put the question this way: Did your cats clear the area——

A. One of them did, I know.

Q. Let me finish the question, please. Did your cats clear the area between Tok Junction and Dot Lake?

The Court: What is the name of the lake?

Q. Dot, D-o-t, your Honor.

The Court: Is that the end of the 96 miles?

Q. No, sir.

A. They cleared up until they broke down, yes, and one went all the way to Dot Lake.

Q. I'll repeat the question. Did your cats clear the area from Tok Junction to Dot Lake? [223]

A. They cleared up until they broke down.

Q. Will you read the question back to him please?

(The last question was read by the Reporter.)

The Court: I think we understand the question whether or not your cats cleared the area up until Dot Lake, and you said until they broke down. Was that near Dot Lake?

A. Until we broke down there was one cat that did finish up to Dot Lake.

Q. Well, your Honor, he hasn't answered the question yet.

A. But there was other cats that was brought in, yes.

Q. These cats cleared the area with the help of this one cat, with the help of two others that they brought in, they did clear the area up to Dot Lake?

(Testimony of Stuart E. Tope.)

A. That's right.

Q. Well, then cats other than yours were used to clear the area between Tok Junction and Dot Lake?

A. With the help of this one that was left, yes.

Q. Will you please just answer my question, Mr. Tope? Now, those questions can be answered yes or no. Did cats other than your own aid in clearing the area between Tok Junction and Dot Lake? [224]

A. Yes.

Q. How many?

A. There was two extra cats brought in to clear the area from there to Dot Lake.

Q. Did any of your cats go beyond Dot Lake?

A. One.

Q. How far did it go?

A. I think they called it Shaw Creek, is where the two different ends met; almost to, well, it was between Dot Lake and Johnson River.

Q. How far beyond Dot Lake approximately did that cat go? It went beyond Dot Lake about how many miles?

A. I am guessing at this; I would say eight miles.

Q. Now, you lost one at Robinson River?

A. Just on the other side of Robinson River about a mile, yes, north of Robinson River.

Q. Where did you lose the other?

A. The first one was lost at Cathedral Bluff.

Q. The second one was lost at about a mile beyond Robinson River. Well, now, is this true, Mr.

(Testimony of Stuart E. Tope.)

Tope: That one of your cats operated from a point about five or six miles northwest of Tok Junction to a point about eight miles northwest of Dot Lake?

A. Yes. [225]

Q. Is it true that another of your cats operated from the same point northwest of Tok Junction to a point about one mile north of the Robinson River?

A. That is right.

Q. Is it true that the third of your cats operated from the same point northwest of Tok Junction to a place called Cathedral Bluff?

A. Yes, beyond Cathedral Bluff, yes, or right at Cathedral Bluff, I would say, yes.

Q. Is that the only place that those cats worked on this job? Does that cover the areas they worked on?

A. That's right.

Q. Now, these Oaks' invoices that Mr. Hubbard had, how often did you get one of those?

A. Every week.

Q. Did you ever object to any of them?

A. No, sir.

Q. Did you from time to time receive what were called "statements" to the effect that so much money was earned and that the cost incurred in clearing so much as had been cleared to so much amount?

A. I never received any from him, no. [226]

Q. Do you understand what I am asking about now? Did you ever receive any statements where Oaks claimed you owed him money?

A. Yes, I believe I did.

(Testimony of Stuart E. Tope.)

Q. How many times?

A. I just don't know.

Q. More than once?

A. I just don't know.

Q. Do you have any of them?

A. Pardon?

Q. Do you have any such claims or statements wherein Oaks contends that you owe him money?

A. If they are they're in those records there of—that Mr. Nesbett has.

Q. Are there any in those records?

A. I don't know.

Q. Did Oaks tell you he was going to carry the payroll? A. Yes, he did.

Q. Well, didn't you testify on direct examination that you didn't make any agreement to pay Workmen's Compensation or Employment Security Commission taxes and stuff like that?

A. Would you repeat that, please?

Q. Did you not testify on direct examination that you made no agreement to pay Workmen's [227] Compensation costs, Employment Security Commission taxes, and similar things, charges relating to a payroll?

A. I never made any agreement, no.

Q. You made no agreement to pay them?

A. No.

Q. Who did you think would pay them?

A. Well, I imagine Mr. Oaks would have to pay them.

(Testimony of Stuart E. Tope.)

Q. Well, it would follow then, if he is going to carry for the payroll that he would pay those taxes?

A. Beg your pardon?

Q. Would it not follow that if he was carrying the payroll he would carry the taxes and other charges too? A. He would have to, yes.

Q. So you thought he would pay them? Is that correct?

A. I am sure he would if he was carrying the payroll.

Q. Now, let's go to your testimony concerning Mr. Harlan, Mr. Tope. I find that somewhat confusing. Did you testify that you tried to hire Harlan and could not? A. After Mr.—

Q. Did you so testify on direct examination? [228] A. Yes.

Q. Now, was that your first attempt to employ Mr. Harlan? A. Yes.

Q. Now, did you try after that? A. Yes.

Q. To employ him? A. Yes.

Q. And did you employ him after that?

A. Yes, I employed him for about a week.

Q. And you did? A. Yes.

Q. And you employed him for about a week?

A. Yes.

Q. Do you know when, by any chance?

A. When?

Q. Yes?

A. I can't give the exact time, no.

Q. What did you ask him to do? What was he employed to do?

(Testimony of Stuart E. Tope.)

A. Well, there was a tractor down with a blown piston.

Q. To repair a cat then?

A. That's to repair a cat.

Q. Did you ever employ him again?

A. Once again, for about three days, until a replacement [229] came down from Fairbanks.

Q. To do what?

A. To take over this cat.

Q. To operate it? A. Yes.

Q. Are those the only times you employed him, those two times?

A. That's the only times.

Q. And now, was the first time that you tried to employ him and couldn't, the only time that you tried to and didn't? A. That's right.

Q. You said he wasn't paid?

A. No, he wasn't.

Q. Well, now then, you knew these McLaughlin cats and these Babler-Rogers' cats were on the job, did you not? A. Yes, I did.

Q. Did you explain about that?

A. No, I didn't.

Q. Did you make any comment at all concerning their presence? A. I can't recall.

Q. Did you welcome their presence?

A. I could have. [230]

Q. Did you ever try to hire those McLaughlin cats, yourself?

A. Yes, I believe I did.

Q. How many did you try to hire?

(Testimony of Stuart E. Tope.)

A. I think I tried to hire one to replace the one that blew the motor.

Q. Just one? A. That's all.

Q. Who did you talk to about that?

A. I believe it was Mr. Heck.

Q. He let you have it?

A. He says, "No, you are not going to put it in that rock pile."

Q. How many cats did you have at the time you tried to hire this one from McLaughlin?

A. Running?

Q. How many operating—that's right.

A. I believe there was two.

Q. Now, you testified on direct examination, did you not, that you stayed on that job until it was finished? A. And beyond that.

Q. And for how long did they pay you your so-called "foreman's wages?"

A. Well, that ended around the first of April, sometime [231] in April, I couldn't tell you exactly, I just don't know.

Q. Well, what were you doing?

A. Well, seeing if I couldn't get some parts for the cats and come down there; the cat was working, my truck was working there, my pickup was running and they were using it and I was trying to use the station wagon.

Q. I am not asking you what they were doing. What were you doing?

A. I was just going up and down the line.

Q. You were riding up and down the line?

(Testimony of Stuart E. Tope.)

A. That's right.

Q. You never did leave the job?

A. I had to go to Fairbanks, yes.

Q. For parts, too?

A. That is right, parts.

Q. And you never pulled your equipment off the job?

A. Yes, I did. About a week before the job finished, I refused to let them use it any more.

Q. Now, that would be about April 24?

A. Somewhere between there and—no, I would say—it was around May 1.

Q. And that was one cat?

A. That's the best that I can recall, yes, and the [232] truck and the pickup.

Q. That is the Dodge truck?

A. That is right.

Q. That's that GMC pickup?

A. That's right.

Q. Well, then from April 1 to May 1, you as an individual were just riding up and down the road. That's your testimony, isn't it?

A. Well, I brought some parts back, I'm positive I did that.

Q. Didn't you testify a minute ago that you were just riding up and down the road?

A. Well, yes, I was checking the job, if that's what you mean, what my equipment was doing, what my cat was doing, yes.

Q. You were checking the job then when you were riding up and down the road?

(Testimony of Stuart E. Tope.)

A. That's right.

Q. And why did you pull your equipment off?

A. Well, I hadn't received any foreman's pay and hadn't received any estimates from Mr. Oaks, so there was only one other thing left to do, and that would just beat my equipment to death as it was, so I just pulled it off.

Q. Well, what estimates did you expect? [233]

A. Well, I expected, at least, some compensation of some kind.

Q. Well, you said you hadn't received any estimates?

A. Yes, for the—well, for any monies to be paid to the N. C. Company for the rental, I received nothing.

Q. Will you read that answer back to me, please?

(The last answer was read back by the Reporter.)

Q. If they had been paid to the N. C. Company, naturally, you wouldn't receive them, Mr. Tope. What did you expect in the way of estimates?

A. Well, monies to compensate the time that the cats were on the job.

Q. What is an estimate?

A. As in construction language, well, you could take an estimate on their hourly basis or under a contract basis.

Q. You could, huh? A. Why certainly.

Q. Well, now, were you fired as a foreman?

A. Nobody fired me that I know of.

(Testimony of Stuart E. Tope.)

Q. And you never quit?

A. No, and I was never fired.

Q. They just stopped paying you?

A. That's all. [234]

Q. Now, after you lost your second cat at Robinson River, when was that—when did you lose that cat at Robinson River?

A. Well, the exact time, I can't tell you just when it was. You'll have to look at—

Q. Well you got some idea, haven't you, Mr. Tope?

A. No, I haven't.

Q. You have no idea?

A. No idea.

Q. Well—

Mr. Nesbett: If the witness had been permitted to answer the question, he would have told him how to find it.

Mr. Dunn: How can I find it, Mr. Tope?

A. Well, from Mr. Oaks' invoices, whatever they are.

Q. And the ones that you gave him—excuse me, the ones he gave you?

A. The ones he sent to me, yes.

Q. Where are they?

A. I don't know, I guess they're on Mr. Nesbett's desk.

Q. Or has Mr. Roberts got them?

A. Well, he could have, I don't know what he took out of here.

Q. Do you have those invoices with you? [235]

Mr. Nesbett: I thought he was going to say, "Look at Exhibit 2." It will show when a cat went

(Testimony of Stuart E. Tope.)

completely out of action last time he charged rental on it. That would indicate when it went out of action.

Q. I hand you Plaintiff's Exhibit—excuse me, what is this?

The Clerk: It's 2 for identification.

Q. I hand you Plaintiff's Exhibit 2, can you tell me from that some way when you lost that cat at Robinson River?

A. The one cat—that is February 13, and the other cat——

Q. I am interested only in the one at Robinson River; that was the second one you lost, isn't it?

A. Yes.

Q. It says here, "April 3." Well, now what did you do between April 3 and May 1? What did you do?

A. Well, as I said, I went up and down the pipeline and went to Fairbanks.

Q. You weren't foreman on just one cat then?

A. Well, you could say that, yes. I wasn't even foreman on that, Mr. Abbott was taking charge of that; Mr. Abbott had charge of that cat. [236]

Q. Well, you didn't have charge of any cats after April 3, then?

A. After Mr. Abbott came on the job, I didn't have any chance of—I had no direction of any of the equipment then.

Q. It was better under Hager?

A. Not with Hager either.

Q. Then, you never did have——

(Testimony of Stuart E. Tope.)

A. Nothing. I don't know what I was on as foreman for in the first place, other than to receive some money to live on, that is about all.

Q. Do you know why you were being paid?

A. When I wasn't running my own job, I guess I wasn't being paid.

Q. You got the money, didn't you?

A. Yes.

Q. But you don't know why?

A. I don't know why.

Q. You kept it? A. Yes.

Q. When you said you don't know why they paid you when you weren't running your own job, didn't you? A. Would you read——

The Court: I didn't understand that question. [237]

Q. I said, you said they paid you when you weren't running your own job, didn't you? Well, did you think you ought to be paid when you weren't running your own job?

A. You would have to repeat that, now.

Q. Did you think you ought to be paid when you weren't running your own job?

A. No, I don't think so; I wouldn't do it.

Q. Do you think you should have run your own job?

A. If I was left to run it, I should have, yes.

Q. They interfered with it?

A. Yes, they did.

Q. But you don't think they should have, is that right?

(Testimony of Stuart E. Tope.)

A. They should not have, that's right.

Q. Mr. Tope, I have asked for various documents, do you have here, the minute book of Stuart Construction Company?

A. I think Mr. Nesbett has it there.

Q. May I have it? (Mr. Nesbett handed it to him.) Are you familiar with this, or would you like to take a look at it before I ask you some questions on it?

A. I would like to look at it, yes. [238]

(The book is handed to the witness.)

A. That's enough.

Q. Is that the minute book of Stuart Construction Company, Inc.?

A. That is the minute book of Stuart Construction Company.

Q. Is that all of the minutes relating to this corporation?

A. Mr. Sanders prepared this and he kept track of this book.

Q. Is that all of the minutes relating to Stuart Construction Company, Inc.?

A. I'm pretty positive that they are.

Q. Now, when I took your deposition, Mr. Tope, you told me that when you said "pretty positive" you meant positive. Does that still stand?

A. Well, I should say, yes.

Q. Well, you are positive?

A. I am pretty positive that is it.

Q. You are, and "pretty positive" means positive, is that right?

A. Well, that's good enough, yes.

(Testimony of Stuart E. Tope.)

Q. Now, I guess I better leave this up here. Mr. Tope, under the minutes of this corporation, what limitation was placed upon you as an [239] individual? In what way were your powers limited?

Mr. Nesbett: Your Honor, I'll ask that he be shown the minutes with respect to each question.

Mr. Dunn: I didn't quite catch——

Mr. Nesbett: I ask that he be shown the minutes with respect to each question.

Mr. Dunn: I will be glad to comply with that. (Mr. Dunn showed the witness the book again.)

Q. (By Mr. Dunn): Would you like for me to repeat my question, Mr. Tope, or do you remember it? A. Pardon?

Q. I asked whether or not you remembered my question or——

A. No, I would like to look at this some more, please, if I may?

Q. I don't mind.

The Court: Now, your question?

Q. What limitation, if any, is placed upon your power by virtue of those minutes?

A. President of the corporation.

Q. You are limited to being president?

A. Well, it was voted here, it states it was voted [240] into one, the secretary and president.

Q. I'll repeat my question. What limitation is placed on your power by virtue of those minutes? Do those minutes say that there is anything that you cannot do with respect to Stuart Construction Company, Inc.?

(Testimony of Stuart E. Tope.)

A. No, not that I can see in here.

Q. Does it say there is anything you can do?

A. No, it doesn't.

Q. Can you find there, Mr. Tope, minutes of a meeting of the Board of Directors held November 17, 1952? A. November 17, 19——

Q. That's what I meant to say; I assume that is what I said, November 17, 1952, Board of Directors' minutes. Well, your Honor, I can save time possibly by merely offering this in evidence.

The Court: Yes.

Q. It will speak for itself if it's admitted.

The Court: Is that a board meeting in November, 1952, or '53?

Q. It's——

The Court: Board meeting of November of '53 was close to the time of this contract is all. [241]

Q. No, '52, your Honor.

The Court: Have you got it in mind there so that it would shorten it up; that would——

Q. Your Honor, I would like to offer it in evidence, the minutes of the meeting of the Board of Directors, November 17, 1952, April 1, 1953, September 17, 1953, and April 1, 1954.

The Court: Well, I take it, your question all refers to his authority under it as president of the corporation?

Q. Question his authority?

The Court: I would just infer that from your questions.

Q. Not quite, the contrary. The minutes show

(Testimony of Stuart E. Tope.)

that he had unlimited authority, that he can do anything he wants to do.

The Court: That's what I said; I take it is related to his authority.

Q. Oh, related to his authority, I thought you said, "questioned his authority." I misunderstood you, I am sorry.

The Court: Is there any issue here but that he had unlimited authority as president of the corporation? [242]

Mr. Nesbett: I don't know of any up until now; I can't see that it makes any difference.

The Court: I don't believe it does up until this time. And I assume that he would have had the usual powers of an executive.

Mr. Nesbett: With exception of possibly the minutes of April of 1954, which I haven't seen; I don't see that any of the others are relevant, they're long prior to the times involved.

The Court: Counsel wants to show that he had unlimited authority and I think we can assume that the executive of a corporation is presumed to have power, usual power of executives.

Mr. Dunn: Yes, your Honor.

The Court: So I think we can proceed upon the theory that he had the usual powers and if the question arises that whether he was limited in his authorities, why then it would make these questions competent.

Mr. Dunn: Your Honor, what I am trying to

(Testimony of Stuart E. Tope.)

show is that he had unusual powers, but extraordinary powers. [243]

The Court: Suppose you proceed upon that theory and then if that is challenged, why then you can offer these records. I don't know whether that would become competent at this time; I assume when you offer it somewhere along the line, you would be able to want to establish that fact.

Mr. Dunn: Well, I have already pointed out, Your Honor, and I understood you wanted to cover all of these things at one time, that we are attacking the corporate structure here; we are saying it's merely an alter ego of Mr. Tope.

The Court: That wouldn't bear on the question of validity of the corporate structure of what authority he had, on the contrary it would assume he had authority and clothed him with authority as an executive of the corporation.

Mr. Dunn: Oh, but within reason, Your Honor, that is what I am trying to show by these minutes, that goes beyond the normal authority for a president of a corporation. That there is no difference between Tope acting as an individual and Tope acting for Stuart Construction Company. In other words—— [244]

The Court: You go ahead in your way and show it.

Mr. Nesbett: Does Your Honor feel they ought to be admitted now, then?

The Court: Well, I think that it would be good enough to call the attention to the extraordi-

(Testimony of Stuart E. Tope.)

nary powers that he might have and I don't know whether that would militate against the validity of the corporation at all or not, but let's assume he had extraordinary powers beyond the usual executive authority of the corporation; let's assume that. And that——

Mr. Dunn: Well, Your Honor, I prefer not only to assume it, I would like to have it in the record.

The Court: Well, let's put it in the record. Let's say it, now that he had the powers——

Mr. Nesbett: All right, Your Honor, Mr. Dunn has photostats, surley he won't mind putting those in evidence rather than take the original here?

Mr. Dunn: Your Honor, I'd have to tear my deposition apart. May I see the deposition? [245]

The Court: Suppose you just read it into the record, what you want to show there. It ought not to require all of the minutes of the stockholders board of directors to show extraordinary powers; there ought to be something in there to indicate that.

Mr. Dunn: Mr. Tope, I call your attention to the minutes of the meeting of the directors held November 17, 1952, and, specifically, to the last full page—full paragraph, I beg your pardon—beginning on page 2, the second page; the one that begins with the words “after consideration.” Have you found that?

A. You said on page 2?

Q. Yes, the second page.

(Testimony of Stuart E. Tope.)

A. Second page.

The Court: Did you find—could you find it and read it, and read what you want into the record, without having him search for it?

Q. Without having him identify it, Your Honor?

The Court: Well, it is already identified; you're at liberty now to read into the record what you say these minutes show, and of course, you understand that the Board of Directors could not clothe him with authority [246] beyond the authorization of the charter of the corporation.

Q. Well, Your Honor, if I just—maybe—I feel like I am being very silly here, but if I merely read this into the record without having Mr. Tope identify it—

The Court: He has already identified it. These are the minutes of the corporation. Now, then whatever they are, and counsel may know, go up in evidence. Now my suggestion is to shorten it up to read what you want into the record.

Mr. Dunn: Well, Your Honor, it seems to me I'm testifying.

The Court: Well, go ahead in your way, I am trying to shorten it up, but can't do it.

Mr. Dunn: That is what I wanted to do when I offered the minutes themselves rather than read it, Your Honor.

Q. (By Mr. Dunn): Can you find the minutes of November 17, 1952?

The Court: Why can't you find it?

Q. Yes, that's a good question, Your Honor.

(Testimony of Stuart E. Tope.)

(Mr. Dunn found them.) [247]

Q. Mr. Tope, I invite your attention in your minute book, to the minutes of directors of November 17, 1952, to the second page thereof, and, specifically, the paragraph beginning with the words "after consideration." Do you see the place I mean? A. Yes.

Q. I am going to read that paragraph to you. "After consideration of the question of management of this corporation, it was moved by Donald F. Maynick and seconded by Bertha Tope that the officers immediately take their positions and that the President, Stuart E. Tope be authorized to manage the corporation and that he be fully authorized to bind the corporation by any means whatsoever that he may think fit in the performance of his duties as President and General Manager of the corporation, and since the said Stuart E. Tope will spend considerable time away from home, and away from Anchorage in pursuit of his duties, as manager of the corporation, that the corporation pay Mr. Tope's room and board and for all other expenses in connection with travel and domiciling away from home, and that Mr. Tope be paid [248] \$250.00 per week as wages while the said Stuart E. Tope was actually doing work on construction jobs for the corporation, in his capacity as manager. The motion was put before the house and all members voted in the affirmative and the President declared the motion duly carried."

(Testimony of Stuart E. Tope.)

Q. Did I correctly read the paragraph of those minutes? A. That is correct.

Q. Now, I invite your attention——

The Court: It's the same there after—this is just the same in other meetings.

Mr. Dunn: I am not sure, Your Honor, as a matter of fact——

The Court: Well, read it.

Q. (By Mr. Dunn): I now invite your attention to the next to the last paragraph of those same minutes, and I read it to you: "It was moved by Bertha E. Tope and seconded by Donald F. Maynick that Stuart E. Tope and Bertha Tope each be authorized to sign any and all checks on behalf of this corporation on the monies that they may choose to place in any bank in Anchorage, Alaska. The motion was put before the house and all of [249] those present voted in the affirmative, whereupon the President declared the motion duly carried." And I ask you if I read that paragraph correctly? A. That is correct.

Mr. Dunn: No, there is a difference, Your Honor, on these.

The Court: Very well.

Q. (By Mr. Dunn): I invite your attention to the minutes of the meeting of directors of April 1, 1953, and, specifically, to the paragraph approximately at the middle of the page, and I now read: "Move that Stuart E. Tope remain as a General Manager of the corporation business. With full power and authority to handle any and every trans-

(Testimony of Stuart E. Tope.)

action confronting him at any time concerning the business of this corporation and with full power to bind, and obligate this corporation in any way that he may see fit."

Q. And I ask you whether or not I read that correctly? A. That it correct.

Q. I call your attention to the minutes of directors of September 17, 1953; the next to the last large paragraph, and I'll now read: "Whereupon the motion was duly made and carried that [250] Stuart E. Tope, as General Manager, be given full power and authority to negotiate a contract with any company, corporation partnership, or individual for any type of construction or clearance work, and that said manager's powers should be unlimited in scope. And he is authorized to sign any and all instruments necessary to carry on the general contracting, construction, excavating, or clearance work."

Q. And I ask you whether or not I read that correctly? A. That's correct.

The Court: You said there was minutes of September, 1953?

Q. That's right, Your Honor.

Now, in the minutes of April 1, 1954, of the directors, I call your attention to those and the fourth paragraph from the bottom, and ask you whether or not there is not a similar provision in those minutes that continue your unlimited powers to bind this corporation? Is there such a provision?

A. Yes.

(Testimony of Stuart E. Tope.)

Mr. Nesbett: I'd like to—I wonder if it could be read, Your Honor?

Mr. Dunn: I would be glad to read it. [251] I call your attention to that paragraph that I just referred to and I now read: "Moved that Stuart E. Tope remains the General Manager of the corporation business with full power and authority to handle any and all transactions confronting him at any time concerning the business of this corporation and with full power to find, bind, and obligate this corporation in any way that he may see fit." And then continuing—I beg your pardon, did I read that paragraph correctly?

A. The fourth from the bottom you did, yes.

Q. Is that preceded by the following words: "The following motions were duly made and carried."?

A. Yes.

The Court: It is now five o'clock, Mr. Dunn, may we——

Mr. Dunn: May I ask one more question, please?

The Court: Yes, you may.

Q. (By Mr. Dunn): It will help me in starting tomorrow. Mr. Tope, I hand you Plaintiff's Exhibit 3 and ask you whether or not these are the working hours for the tractors and the rental claim for your [252] automobiles, trucks and station wagon, on which your claim is based?

A. Take it from Mr. Oaks' records, to the best of my knowledge, these are the hours.

Q. Well, do you base your claim on these hours?

A. Yes.

The Court: I think that has been answered in the evidence here before, that he based his claim——

Mr. Dunn: I don't think he did, Your Honor.

The Court: Well, let's go ahead, let's not argue the matter. Let the Court stand in recess until ten o'clock tomorrow morning.

(The Court recessed until Wednesday, August 13, 1958.) [253]

(The trial was continued.)

August 13, 1958.

The Court: Gentleman, are you ready to proceed with the case on trial?

Mr. Nesbett: Yes, sir.

Mr. Dunn: Your Honor, I have prepared something that I thought might be of use to you, which if Mr. Nesbett has no objection to, I am perfectly willing to give you, merely for informational purposes. It is not evidence, what it is, it's a road map of Standard Oil Company, I think that is who put it out—yes, also a list of names with mileposts opposite each name, telling you where on the Highway that particular place is. I don't know if you need—I thought it might be of aid to you in keeping these various places straight.

The Court: If Mr. Nesbett is satisfied that it accurately defines the Highway. Up to this time I have had no use for it.

Mr. Nesbett: I have no objection at all, your Honor, if it will help——

The Court: If it appears to be effective you can call my attention.

Mr. Nesbett: Yes, sir.

The Court: All right, Mr. Dunn.

Mr. Dunn: I mentioned this earlier, Sir, I am sorry I forgot about it. [255]

Mr. Dunn: Before I proceed with cross-examination, I would like, if you will bear with me, to explain my position as to what I am trying to get at. I feel there is some confusion here.

The Court: Well, I don't believe there is any confusion, but then I—up to this time, I am not, would not appreciate what you're trying to get to, because clearly, the corporation may be guilty of irregularities, but that does not destroy its corporate entity; I am not saying the many records you offered in evidence clutters up the record; I am not saying that that is not in accord with usual authority that is granted to a management, but if they exceed the authority of the corporation, it is merely ultra vires. Now, that is all, it doesn't destroy the corporate entity, but its ultra vires. I am not saying it has even ultra vires to clothe with full power, although they could clothe them with full power under the authority, that is all, and if he did act beyond it, why he was guilty, that is the corporate, the operators, ultra vires of it, but the corporate entity is just the same. Now, there is no issue here as to whether this man received corporate right at all; there is no issue of that sort. Either there was a corporation or there wasn't one and we ought to immediately

find out whether it was a corporate entity at the time. [256]

Mr. Dunn: That is what I am getting at.

The Court: This will not help us in determining that question.

Mr. Dunn: My feeling is that was one of a number of elements to be considered.

The Court: I don't think it would be even an ultimate to consider whether it was a corporate entity or not. The very fact that the stockholders would authorize somebody to do something, it might or might not be within the corporate authority.

Mr. Dunn: Very well, Your Honor.

STUART E. TOPE

resumes the stand in cross-examination.

Cross-Examination

By Mr. Dunn:

Q. Mr. Tope, you testified, did you not, that you spent a considerable amount of time riding up and down the highway after the first of April and prior to that time, going for parts and things of that nature? A. Yes.

Q. During the course of your travel up and down the highway, did you have an occasion to observe the sections of the line in Alaska other than the ones on which you worked? A. Yes.

Q. Did you form any opinions as to the difficulty of [257] clearing those sections as compared to your own? A. I don't believe so.

(Testimony of Stuart E. Tope.)

Q. You still think your section was the easiest, then?

A. I wouldn't say it was the easiest, it came out later on that it was the toughest, I believe.

Q. You think your section was the hardest?

A. Yes.

Q. Who, Mr. Tope, is Donald Maynick?

The Court: Donald who?

Q. Maynick, M-a-y-n-i-c-k, is it not, Mr. Tope?

A. That is right.

The Court: Now, the first name, I am sorry?

Q. Donald.

The Court: Donald Maynick, very well.

Q. Who is he, Mr. Tope?

A. He is a brother-in-law.

Q. Your brother-in-law? A. Yes.

Q. That would be the brother of your wife?

A. That's right.

Q. Is Mr. Sanders still a stockholder in Tope Construction Company here?

A. I just can't tell you that, I just don't know.

Q. I hand you this book and ask you if this is the [258] official minute book of Tope Construction Company, Inc.?

The Court: It was identified yesterday, wasn't it, as the official minute book?

Q. It was, Your Honor, but I want to tie it to what I am showing him now.

The Court: As I said, it was already identified, so you have a right to find out anything you want to.

(Testimony of Stuart E. Tope.)

A. Yes.

Q. What is the date of the last minutes?

A. October 25, 1954.

Q. Is that a meeting of the board of directors?

A. Yes.

Q. Does that authorize you to bring suit against Oaks Construction Company? Do those minutes so authorize you? A. Yes.

Q. Your Honor, to avoid—to save time I would like to offer these into evidence rather than reading them into the record.

The Court: Whether you read them or not they will then be in the evidence; they will be in the record. I am indifferent about it.

Mr. Nesbett: I have no objection. [259]

Mr. Dunn: I so offer these minutes.

The Court: Defendant's exhibit what?

The Clerk: Defendant's C.

The Court: What?

The Clerk: Defendant's C.

The Court: You should read the paragraph you want me to note so I can know what it is.

Mr. Dunn: Yes, Your Honor.

The Court: You may not read them all, but just the paragraph that you——

Mr. Dunn: "Upon motion duly made and carried, the Board of Directors authorized and empowered the president and general manager, Stuart E. Tope, to retain legal counsel and furnish all costs and expenses necessary to file suit against any and all parties necessary in order for the corpora-

(Testimony of Stuart E. Tope.)

tion to effect collection on the contract made with the Oaks Construction Company, dated December 17, 1953."

The Clerk: Is this for identification?

Mr. Dunn: No.

Mr. Nesbett: Those are of what date?

The Court: October 25, I believe, it is.

Mr. Dunn: Yes, His Honor is correct. [260]

The Court: Suit was filed in February of 1955, that is, I am reading now from the filing mark.

Mr. Dunn: Now, Mr. Tope, I return the minute book to you and ask you if it contains the by-laws of this corporation?

A. It says, "By-Laws of the Stuart Construction Company, Incorporated."

Q. Are those the by-laws of the Stuart Construction Company?

A. Yes, I guess they are: it says so that they are.

Q. I invite your attention to Article II, Section 1, of those bylaws, and ask you whether or not that sets the time for an annual meeting of this corporation?

A. Yes.

Q. And what is the time so set?

A. Two o'clock in the afternoon.

Q. On what date?

A. On the 17th day of November.

Q. Is that the annual meeting of the stockholders?

A. Yes.

Q. Now, will you please examine that minute book and tell me how many annual meetings have been held on that date? Your Honor, again, time

(Testimony of Stuart E. Tope.)

can be saved merely by offering this entire minute book. [261]

The Court: Very well, suppose you do that. You know what——

Mr. Dunn: I so offer it.

Mr. Nesbett: I have no objections, your Honor, I think though if counsel wants it in evidence we can stipulate now that the entire minutes and by-laws offered into evidence be photostated and substituted for the original, and the original returned to the corporation.

The Court: I think that is the usual practice.

Mr. Nesbett: At Mr. Dunn's convenience, of course.

Mr. Dunn: That can be done, or they can be withdrawn subsequent to the trial, your Honor.

The Court: Yes.

Mr. Dunn: Can we also stipulate that the entire minutes and everything contained in the minute book become Defendant's Exhibit C, rather than merely that one page?

Mr. Nesbett: That is all right with me.

Mr. Dunn: For your Honor's information, I would like to state, if I may, as to what minutes concerning annual meetings are set forth in that minute book. [262]

The Court: As to what minutes, well, you can do that, of course, it's now in evidence and you have a right then to——

Mr. Dunn: I merely wanted to call a certain part of it to your attention.

(Testimony of Stuart E. Tope.)

The Court: Very well.

Mr. Dunn: There is a meeting, your Honor, of the stockholders on November 17, 1952.

The Court: That is shortly after the inception of the corporation.

Mr. Dunn: That is true. The next minutes of the stockholders is April 1, 1953. The next minutes of the stockholders is April 1, 1954, and there are no subsequent ones.

The Court: Of course, if it is a question of the stockholders not holding meetings conformable to the by-laws, or the law itself for the State, then, by quo warranto, it can put the corporation out of business.

Mr. Dunn: I know that, sir.

The Court: It is not for me to put it out of business, that is for the State.

Mr. Dunn: I don't want you to put it out of business.

The Court: That issue is not before me, [263] but your point is that it was not a legitimately acting corporation.

Mr. Dunn: That is true, sir.

The Court: Well——

Mr. Dunn: That in fact, it was an individual acting.

The Court: Yes. The only authority for putting it out of business would be the State, or by the Territory, by quo warranto. I take it, it is incorporated under the laws of the Territory and not under the laws of the national government?

(Testimony of Stuart E. Tope.)

Mr. Dunn: That's true.

Q. (By Mr. Dunn): Mr. Tope, did you ever do any right of way clearing before this job?

A. I did some clearing for Mr. Munter.

Q. Did you ever do any right of way clearing before this job? A. No.

Q. Did you have any experience in those—in operating cats in these extremely cold temperatures prior to this job? A. No.

Q. Mr. Nesbett, could we stipulate again, in the hope of saving time, that the deposition of [264] Mr. Tope in its entirety with attached exhibits be submitted into evidence?

The Court: I believe, Mr. Dunn, you would have the right to offer it in evidence, the deposition, if you conceive the notion that it is not in harmony with his testimony. That is the right that you would have to offer any contradictory testimony that you have.

Mr. Dunn: Well, I believe——

The Court: If you identify the deposition, I think it is also wise to call attention to what you think is an inconsistency. The practice is, at least, it has been the practice to just simply offer the deposition and then point out later on the inconsistencies.

Mr. Dunn: Yes.

The Court: I think a better practice would be to call his attention to what you think is an inconsistency in his testimony here and in the deposition.

Mr. Dunn: I intend to do that, your Honor. May

(Testimony of Stuart E. Tope.)

I have the deposition, please, it is in the file someplace. (The Clerk is looking for the deposition of Mr. Tope.) I will pass that for the moment, your Honor. [265]

Q. (By Mr. Dunn): Who is secretary-treasurer of Stuart Construction Company now?

A. Bertha Tope.

Q. Who was during the time that you were doing this clearing? A. Bertha Tope.

Q. Did you assign this contract of November—correction, did you assign this contract of December 17, 1953, now Plaintiff's Exhibit 1, to the N. C. Company?

A. I assigned all monies of the contract with the N. C. Company at Fairbanks.

Q. Now, was that in keeping with your pattern of previous assignments that you testified to yesterday? A. Yes.

Q. To pay them for these lease rental agreements?

A. It wasn't all to be paid to the lease-rental agreement deal, I don't believe.

Q. But it was to pay N. C. Company for monies owed? A. Yes.

Q. And that was the reason that you did that to see that the N. C. Company got its money?

A. Yes.

Q. I hand you this instrument and ask you if you can [266] identify the same? Can you identify it? A. Yes.

Q. What is it? A. It is an assignment.

(Testimony of Stuart E. Tope.)

Q. What assignment?

A. It's an assignment—shall I read it?

Q. No. It is an assignment from whom to whom?

A. It's an assignment from the Stuart E. Tope to Northern Commercial Company.

Q. From Stuart E. Tope?

A. Stuart Construction Company; just a minute and I'll check it.

The Court: What is the name of that company in Fairbanks?

Q. Northern Commercial Company, your Honor. We speak of it as the N. C. Company; that is habit, sir.

A. Stuart Construction Company.

Q. Is that who executed the assignment?

A. That is who signed it; I signed as president.

Q. And it runs to the Northern Commercial Company?

A. It is to be run to the Northern Commercial Company in Fairbanks.

Q. Is this the one that covered the contract of December 17, now Plaintiff's Exhibit 1?

A. Yes. [267]

Q. I would like to offer it in evidence, please.

The Clerk: Defendant's Exhibit D.

The Court: May I inquire, Mr. Dunn, is that the assignment of the benefits that might accrue to the plaintiff under the contract of December 17?

Q. I believe the way it reads, your Honor, is the assignment of all monies earned with respect to pipeline clearing, yes.

The Court: That is what I supposed.

(Testimony of Stuart E. Tope.)

Mr. Nesbett: May I ask the witness a question or two about this?

The Court: Yes.

Q. (By Mr. Nesbett): The date of this assignment is December 2, of 1953; is that the date, or approximately the date you signed it?

A. Yes, if it's on there that is the date it was signed.

Mr. Nesbett: I have no objection, your Honor.

The Court: Does this refer to the prospective contract to be entered into?

Mr. Dunn: I will read it—it doesn't refer to the contract. [268]

The Court: It doesn't?

Mr. Dunn: No, it merely says, "All sums of money now due or to become due us from Oaks Construction Company for any and all accounts, including but not limited to earnings, to become due under pipeline clearing contract and/or snow clearing."

The Court: Yes, it was in the prospect.

Mr. Dunn: Yes. I would like to offer the deposition of Mr. Tope with attached exhibits into evidence.

Mr. Nesbett: I would like to ask for what purpose, your Honor? I have no particular objection.

The Court: It could only be for one purpose, for contradiction, impeachment purposes. Now, the courts have held, and I think we ought to be liberal about it, but the courts have held that a previous deposition is not competent for the whole of it, not

(Testimony of Stuart E. Tope.)

to be competent, to show the witness the deposition and show him that part concerning which you think there was an inconsistency and then offer that part. Now, it is the practice, I observed it over and over again where the entire deposition be offered, but, of course, if there is no contradiction then to clear up the record now, if you are of the mind that it does impeach the witness on all the points covered. I imagine that deposition only [269] appertains to this one thing, this one contract. So that it will not severely subject matters there, why then you have a right to offer it. Counsel asked for what purpose and, as I said, I think I am correct when I say it can only be offered for impeachment purposes.

Mr. Dunn: Your Honor, I don't contend that everything in this deposition is contradictory to what the witness has testified to and I am more than willing to call attention——

The Court: I think that would be the better practice to do that, then counsel would be advised and the witness would have an opportunity to explain—may be able to do that.

Mr. Dunn: I offer it now, please.

The Court: Is it Exhibit E?

The Clerk: This is E.

The Court: Yes, I think, Mr. Dunn, that is the better practice to call his attention to what you think is an inconsistency between his testimony now and given in the deposition.

Mr. Dunn: Thank you, sir.

(Testimony of Stuart E. Tope.)

Q. (By Mr. Dunn): Mr. Tope, I now hand you Defendant's Exhibit E——

The Clerk: It should be D—no, that's right.

Mr. Dunn: E as in Easter?

The Court: I take it there is no question but that is his deposition and he signed it and remembers it and everything?

Mr. Dunn: Is there any question in your mind Mr.—well, your Honor, it came from the Clerk's files, we know that.

The Court: That may be true, but you have a right to assume that it's his deposition, but I believe the root rule is to ask him if that is his deposition.

Q. (By Mr. Dunn): Is that your deposition, Mr. Tope, taken on February 13, 1957, and the following day too, as a matter of fact?

A. I have signed this.

Q. Correction, I will restate my question. Is this your deposition given in Anchorage, Alaska on February 13, 1957, and also on February 18, 1957?

A. It so states here and I signed it.

Q. It is or isn't? A. I guess it is, yes.

Q. Now, I'll call your attention, Mr. Tope, to Defendant's Exhibit 1, attached to that deposition, and particularly, to the large page entitled, [271] "Financial and Operating Statement," did you cause that Financial and Operating Statement to be prepared? A. Yes, I did.

Q. Who prepared it? Who did you have prepare it? A. An accounting firm in Fairbanks.

(Testimony of Stuart E. Tope.)

Q. What was the name of the accounting firm?

A. Marlor Accounting Service.

Q. Was that prepared from records that you gave them? A. Yes.

Q. Is it accurate to the best of your knowledge?

A. To the best of my knowledge, yes, it is accurate.

Q. You may fold that up, Mr. Tope, if you will, and I invite your attention—maybe I better help you with that, that is sort of tricky. I invite your attention to page 22 of that deposition. Now, I am going to read questions and if I misread one, I want you to immediately correct me. And I want you to read the answers. Speaking of the contract of December 17, 1953, Plaintiff's Exhibit 1, at the top of the page. "Did the Stuart Construction Company begin work under that contract?"

A. "Yes."

Q. "Did the Stuart Construction Company fully perform that contract? [272]"

A. "It did not."

Q. "To what extent did Stuart Construction Company perform that contract?"

A. "In actual mileage?"

Q. "In percentage?"

Mr. Nesbett: Your Honor, I don't know what is going on; I didn't buy a copy of that first half of Mr. Tope's deposition and I think this is an improper way to get the deposition before the Court, and anyway—in any event, and I suggest—

(Testimony of Stuart E. Tope.)

The Court: Well, the rule is to ask the witness about a statement about the facts in the case and then confront him with the deposition and you answer the question concerning the same subject matter as follows: Did you answer the same subject matter in the deposition?

Mr. Dunn: All right, sir, if you wish.

The Court: It isn't the way I wish, it's what I concede to be the law, getting in evidence; counsel has made objection and, of course, we could go on and have you read questions and he would answer as he did in the deposition, but somewhere along the line he must be confronted with a statement made there that is in variance with his [273] testimony here, in order to make the deposition competent.

Q. (By Mr. Dunn): Following your reading on page 22, I invite your attention to line 11, and did you testify, "I couldn't tell you the percentage, I was doing it on mileage." Did you so testify? Now, I want a yes or no answer, Mr. Tope; look at line 11 on page 22 of your deposition, did you so testify? I don't think the witness knows what he is supposed to do, your Honor.

The Court: Well, the question, the proper question is: Did he make the answer there to that question? Read the question and then ask him if that is the answer in his deposition. The witness doesn't understand.

Q. I'll read to you a part of your deposition beginning on line 7. "Question: To what extent did

(Testimony of Stuart E. Tope.)

Stuart Construction Company perform that contract? Answer: In actual mileage? Question: In percentage? Answer: I couldn't give you percentage, I was doing it on mileage." Did you so testify?

A. I just don't know.

Q. What does it say in your deposition? [274]

A. Which line?

Q. The line I read?

A. Well, you read 22 and—or line 7, is that the one you are referring to?

Q. I am referring to lines——

The Court: Line 7, page 22, as I remember it.

Q. Seven to eleven inclusive.

A. Seven to eleven?

Q. Inclusive.

A. I can't recall just how I testified.

Q. Did I read line 7 to 11 inclusive, correctly?

A. Yes.

Q. What mileage were you referring to, Mr. Tope, when you gave that answer set forth on line 11?

A. I just don't recall how I testified; I just don't know.

Q. You can't remember?

A. I can't remember.

Q. Does the deposition aid you in refreshing your memory at all?

A. I just told you, I just don't remember.

Q. And the deposition is of no aid in refreshing your memory, as to how you testified, is that correct? [275]

(Testimony of Stuart E. Tope.)

A. That is correct, I just can't remember.

Q. I hand you this instrument and ask you if that is your handwriting? Mr. Tope, can't you tell by looking at it, do you have to study it?

A. Yes, I do; that is my signature, but this is not my handwriting.

Q. You recognize your signature, then?

A. I recognize my signature, yes.

Q. Will you read that, please?

A. "For the work period ending it is requested that the Stuart Construction Company be paid the said amount to date total of eleven and two-tenths miles of clearing at one hundred per cent completion and two miles at fifty per cent completion, which is equivalent to 64,416 lineal feet at one hundred per cent completion."

Q. And that is signed by you, is it not, Mr. Tope?

A. That is signed, "Stuart Construction Company, Stuart E. Tope, by Stuart E. Tope and approved by Roy S. Crawford."

Q. What is the date of it?

A. And the date is the 6th of February, 1954.

Q. And——

A. I believe that that is Mr. Crawford's handwriting. [276]

Q. It's your signature though, isn't it?

A. It is my signature.

Q. Mr. Tope, I call your attention to line 12, page 22, of your deposition, which you have in front of you.

A. Yes.

(Testimony of Stuart E. Tope.)

Q. "How many miles does the contract call for?"

A. "One hundred, I believe, or thereabouts, it could vary one way or the other."

Q. "I ask you if that instrument I just handed you dated December 17, 1953, would help you to refresh your memory as to the mileage called for?"

A. "I don't think it was in mileage, I think it was in feet."

Q. Did you so testify at the time your deposition was taken? I would like to offer this, your Honor.

The Court: Very well.

Mr. Nesbett: No objection.

A. If I testified that it wasn't feet—it would have to be in feet.

Q. Now, just a moment, I don't want any more of these stories, I bore with you yesterday.

The Court: The question is: Did he so testify in his deposition? [277]

Q. That's right. Did you so testify in your deposition?

A. I say right here, I don't think it was in mileage, I think it was in feet.

Q. Did you so testify in your deposition? Just answer the question, Mr. Tope.

A. I guess I did, if it says here.

Q. Well, did you or didn't you? I don't want guesses.

The Court: I construe that as saying he did.

Q. Is that what you are saying?

(Testimony of Stuart E. Tope.)

A. I said if it says here in the deposition, I say yes, it did.

Q. Did I read lines——

A. 18, it says right on line 18 that I did.

Q. ——lines 12 to 18, correctly?

A. Yes; I believe you did.

Q. Did you receive the demands from Oaks Construction Company periodically after you began working, on the posting of a bond? A. Yes.

Q. Was that throughout the time you were on the job, pretty much so?

A. Well, the first couple of months, yes. [278]

Q. That would be the months of January and February?

A. That would be the months of December and January; I think I was requested in February, too.

Q. How about March?

A. I just can't tell you whether I did or not.

Q. How about April?

A. That I can't tell you either.

Q. Did you make any effort to get a bond after your negotiation with Bill Olday?

A. I don't believe so.

Q. This equipment that you purchased from the Northern Commercial Company, as evidenced by the lease purchase contract, Plaintiff's Exhibit 4, was that new or used?

A. They were used.

Q. Mr. Tope, I hand you six yellow pieces of paper and ask you if you can tell me what they are?

(Testimony of Stuart E. Tope.)

A. They're bank statements for the Stuart Construction Company.

Q. For what months, please?

A. Well—maybe——

Q. Or maybe I can help you by asking you a leading question. Are those the bank statements for Stuart Construction Company for the months of December, 1953, to and including May of [279] 1954?

A. That's for the months of December——

Q. Of 1953 to and including May of 1954?

A. Up until May, 1954.

The Court: Up to May?

A. Including May.

Q. Now, enclosed in each of those yellow sheets of paper, is there a number of checks?

A. Yes.

Q. Are those the checks evidenced on the statements themselves? Are those the checks evidenced on the statements themselves? Your Honor, I wonder if we could save time by asking that these statements be marked with a notation as to the number of enclosures in each, and having been so marked, call a recess, during which time the witness may examine them?

The Court: Very well.

Mr. Nesbett: I will object to the recess, unless you were going to call one anyway, and we will examine it from 1 to 2 and come back and tell the Court.

(Testimony of Stuart E. Tope.)

The Court: I understand that the Court Reporter needs a recess after one hour, and I will call a recess at this time, however, it ought to be short, so you can quickly go over [280] whether these are statements, whether these are checks and whether debits or credits with the bank, or whether it is, that is the current credit, each check was a debit or credit with the bank, and it ought to be a simple matter to know whether or not they were a statement for the corporation covering that period.

Mr. Dunn: I think so, sir, but I think he apparently wanted to look at them for awhile.

The Court: Where did you get them, from the defendant?

Mr. Dunn: Got them from the Plaintiff's box.

Mr. Nesbett: But it is obvious this witness is extremely careful.

The Court: Would you examine them and see, Mr. Nesbett?

Mr. Nesbett: I will look at them.

The Court: Whether they are the debits against his credits—when I say “he,” I mean the corporation.

Mr. Dunn: I will still repeat my request that these be marked for identification.

The Court: Yes; you have a right to do [281] that.

Mr. Dunn: And that the markings show the number of enclosures in each statement?

(Testimony of Stuart E. Tope.)

The Court: Yes. All under one cover, are they?

Mr. Dunn: No, sir; there are six.

The Court: Well, I mean are you having them as one exhibit?

Mr. Dunn: I would prefer to have them as six to refer to them; it makes it much easier.

The Court: Suppose you say——

The Clerk: G.

The Court: And then say one to 6.

Mr. Dunn: May I request that those be marked as for identification, Defendant's Exhibit G and then 1, 2, and so on, chronologically beginning with the December of 1953. Now, I will continue while she is marking those, if I may, your Honor?

The Court: Very well.

Q. (By Mr. Dunn): Plaintiff's Exhibits 5 and 6, Mr. Tope, I hand you and ask you whether or not you ever answered those letters?

A. I did not.

Q. Did Stuart Construction Company? [282]

A. No; not that I recall.

Q. I invite your attention, Mr. Tope, to page 27 of your deposition, specifically, to line 7: "Question: Mr. Tope, when did Stuart Construction Company begin work under this contract of December 17, 1953? Answer: It was either the second or third of January, 1954. Question: When did it stop work? Answer: I believe it was April 25, 1954, or thereabouts."

Did you so testify at the time your deposition was taken? A. Yes.

(Testimony of Stuart E. Tope.)

Q. Now, you have testified, haven't you, that you attempted to set up a meeting with Williams-McLaughlin & Marwell?

A. And the Oaks Construction Company, too.

Q. Yes, but the meeting at which Williams-McLaughlin & Marwell was to be represented?

A. Yes.

Q. Now, that was the prime contractor on this job, was it not? A. Yes.

The Court: Who?

Q. That was the prime contractor on this job, was it not; was my question, sir. [283]

The Court: Marwell, was that the name?

Q. Williams-McLaughlin & Marwell, your Honor.

The Court: Yes.

A. That is correct.

Q. Well, why did you feel in the light of your contentions as being an employee of Oaks Construction Company that you had a right to meet with the prime contractor?

A. On account of the assignment.

Q. What assignment?

A. That I had given to the N. C. Company in Fairbanks.

Q. You thought that assignment would justify your meeting with the prime contractor?

A. That's right.

Q. Have you not testified, at the time you went to work on this clearing job you didn't have any

(Testimony of Stuart E. Tope.)

money at all? A. I did not.

Q. You did not so testify?

A. I testified that I did not have any money, that's right.

Q. You did so testify then?

A. Yes. [284]

Q. Well, do you have any explanation to offer, Mr. Tope, as to why it was—well, I'll retract that. Did you make your condition known to Oaks Construction Company, your financial condition?

A. I certainly did.

Q. And did you ask him to put you on a salary so you could have some money?

A. I told him I was going to have to have some money and they suggested putting me on the payroll.

Q. And you agreed? A. Yes.

Q. Well, do you have any explanation to offer as to why Oaks Construction Company knowing that you were without funds would waive a bond as you contended it did?

Mr. Nesbett: Now, your Honor, I'll object to that question. It assumes facts that are not based on any testimony of the witness and to the fact that he does claim they waived a bond.

The Court: I never heard it, at least, I don't recall any such testimony, but if my recollection is bad you can—

Q. Well, I will reword the question. Do you have any explanation to offer as to why, [285]

(Testimony of Stuart E. Tope.)

knowing your financial condition, Oaks Construction Company would permit you to start work on that pipeline and continue to work without trying to get a bond from you?

A. Well, Mr. Oaks said that we could do it on an hourly basis if I couldn't get a bond.

Q. Can you imagine why he would permit you to do that, knowing you were broke?

A. Well, knowing that I had been going along on an hourly basis.

Q. Mr. Tope, I invite your attention to page 56 of your deposition, specifically to line 5: "Question: Did you ask to be put on the payroll as a foreman? Answer: I was told I had been put on. Question: That doesn't answer my question; did you ask to be put on? Answer: No." Did you so testify when your deposition was taken?

A. Yes.

Q. I call your attention to page 33 of your deposition, specifically to line 10—well, first let me ask you this question: Does that answer beginning at the top of page 33 deal with a conversation that you had with Mr. Noonan?

A. Pardon? [286]

Q. Does the answer beginning at the top of page 33 deal with a conversation that you had with Mr. Noonan?

A. Yes.

Q. Mr. Noonan was one of the partners in Oaks Construction Company, was he not?

A. He was.

(Testimony of Stuart E. Tope.)

Q. Now, did Mr. Noonan refute or deny your claimed employment on an hourly basis?

A. Not that I can recall.

Q. I now invite your attention to line 10 of that same page. A. Yes.

Q. "And then I told him about Oaks offering me this on an hourly basis and he said Oaks didn't have anything to do with this, he was managing the pipeline." Did you so testify at the time your deposition was taken?

A. It states right here, "yes."

Q. Did you testify on direct examination that you did not know the terms of the settlement that Oaks Construction Company made with the Northern Commercial Company in connection with your account with the Northern Commercial Company in Fairbanks? [287] A. That is correct.

Q. Didn't know the terms of the settlement?

A. No, sir.

Q. Still don't? A. I do now, yes.

Q. Oh, you do now? A. Yes.

Q. Now, calling your attention to Exhibit 2, Plaintiff's, that purports, does it not, to make allowance for the expense of running these cats, or at least that is what you contend, is it not?

A. Yes.

Q. Well, now, how about these various trucks, Dodge 2½-ton, Ford Station Wagon, and GMC pickup? That is all of them, isn't it?

A. Yes.

(Testimony of Stuart E. Tope.)

Q. Wasn't there any expense in connection with running those?

A. There was gasoline, yes, and oil.

Q. Maintenance? A. Yes.

Q. Did you make any allowance for that?

A. It doesn't show here.

Q. There is none, is there?

A. Pardon? [288]

Q. There is none, is there? A. No.

Q. Now, with respect to the cats themselves, you made allowances, did you not, according to your Exhibit 2? A. Yes.

Q. For lubricating maintenance?

A. Yes.

Q. Did you make any allowance for maintenance other than lubrication?

A. Well, what do you classify as lubrication, is that—does that take in the greases and oil and Prestone and the fuel?

Q. Well, I am afraid I will have to turn your question right back on you. You have a column in your Plaintiff's Exhibit 2, do you not, entitled, "Lubricating, Maintenance"? A. Yes.

Q. Now, what did you include in Lubricating Maintenance?

A. Well, it would be the lubricants and the maintenance of it; it would be to maintain it.

Q. Well, is that complete cat maintenance?

A. It would be complete cat maintenance as far as the lubricant of it is concerned, yes. [289]

Q. Well, don't cats need maintenance beside

(Testimony of Stuart E. Tope.)

that lubrication? A. Yes.

Q. Did you make any allowance for that additional maintenance?

A. No, I didn't; I did that myself.

The Court: Mr. Dunn, are you at a point where we might take a recess?

Mr. Dunn: Yes, your Honor.

The Court: Court stands in recess for a period of ten minutes.

(At 11:05 a.m. a ten-minute recess was had.)

Mr. Dunn: May I have Defendant's Exhibit G for Identification?

The Court: Those are the bank checks?

Mr. Dunn: Yes, sir.

Q. (By Mr. Dunn): I hand you Defendant's Exhibits G 1 to G 6, inclusive, and ask you if the checks which comprise part of that exhibit are checks drawn on the account of Stuart Construction Company, Inc.?

A. These are checks drawn on the account of Stuart Construction Company. [290]

Q. And were those checks paid on that account, the ones you have there?

A. Paid on the account?

Q. Yes; were they paid, the ones that you have there?

A. Well, there is some there and I think there is a few NSF's there. I don't know, I believe there are.

Q. Are there a bunch of canceled checks there?

(Testimony of Stuart E. Tope.)

A. Yes; there are.

Q. In an attempt to save time, Mr. Tope, I will tell you that if you will thumb through those checks in Defendant's Exhibit G, you will see a number made out to cash, a number to various bars, and things like that. I believe there is even one to a curio shop. And I ask you if you can explain how it is that those—that checks of that nature would appear in the banking account of a corporation engaged in the construction business?

A. Well, they were cashed for expenses. Along the highway that—they have always had a bar-cafe along here, like Alpine and when you would be going out that way there would be one you would cash there, Alpine, bar-cafe, and you would cash one there, or you would cash one if you [291] needed some money you would cash one; out at the Bear Club Bar and Cafe, or Big Timber or Gateway, or any of those places all have bar-cafes.

Q. You would cash a check whenever you needed money? A. That is right.

Q. Now, are any of those checks signed by any person other than yourself? A. No.

Q. I will call your attention to this check numbered 1082 and ask you if it isn't true that that is made out to LaBrie's? A. Yes; it is.

Q. Where was LaBrie's?

A. It was down here on Fourth Avenue.

Q. And what was it?

A. It was a merchants lunch place.

Q. Lunch only?

(Testimony of Stuart E. Tope.)

A. Oh, no; they had a bar there, too.

Q. They served dinner?

A. They served lunches, yes, uh-huh.

Q. This check number 1083, to whom is it made out? A. I——

Q. Let's see if the endorsement will help us on the back? [292]

A. Yes; Pauline Johnson.

Q. Well, is Pauline Johnson named as the payee on that check?

A. No; it's Rainbow something, I can't distinguish this——

Q. Does the endorsement help you on that?

A. Yes; Rainbow Room.

Q. What is the Rainbow Room or what was it?

A. Well, it was a cafe out—it's a cafe out along the highway out of Fairbanks.

Q. Out of Fairbanks? A. Yes.

Q. I ask you whether or not Check Number 1087 is made out to Stuart E. Tope and in the amount of twenty dollars? A. Yes.

Q. And there are a number merely made out to cash, are there not? A. Yes.

Q. Where is the Silver Fox Lodge?

A. Out of Fairbanks fifty miles.

Q. Which way? A. South.

Q. Where is Tazlina Lodge?

A. Mile 156 out of Anchorage here. [293]

Q. How far would that be from Big Delta?

A. From Big Delta? Well, at that time you had

(Testimony of Stuart E. Tope.)

to go by Tok Cut-off to get to Big Delta, and it is a much longer route——

Q. Well, as the crow flies, how far is it from Big Delta, roughly? A. I can't tell you.

Q. Roughly? Is it over fifty miles?

A. It is over fifty miles, yes.

Q. How far is it from Tok Junction?

A. Big Delta?

Q. No, Tazlina Lodge. Is it over fifty miles?

A. One hundred and twenty-eight miles from Timber to Tok and it's about fifty miles from Tazlina Lodge to Big Timber, so that would make it about one hundred and seventy-eight miles, I imagine.

Q. Where is Alpine Inn?

A. Mile 61 from here, going north.

Q. Is Check Number 1098—that is made out to Bertha Tope and in the amount of one hundred dollars? A. Yes; it is.

Q. Does it show what it is for at all?

A. No; it doesn't. [294]

Q. I hand you Check 1109 and ask you to whom that was made out? A. It's not made out.

Q. It's left the payee as blank?

A. That is right.

Q. Who endorsed that one?

A. Well, I particularly guess I don't know how you pronounce the name.

Q. Spell it, please.

A. W-o-i-t-e-k J-o-e, Joe Woitek.

Q. Do you know what his business was?

(Testimony of Stuart E. Tope.)

A. No; I don't.

Q. Can you tell from looking at the check?

A. Well——

Q. That is a stamp endorsement, is it not?

A. That is the Pioneer Club.

Q. Where is that?

A. I believe that is right here in Anchorage.

Q. How far is it from this very room, courtroom? A. Well, it is almost a block.

Q. Almost a block? A. Uh-huh.

Q. Is check number 1110 made out to Wells Photo? A. Yes.

Q. Is that endorsed by Ward Wells, Ward W. Wells? [295] A. It's his stamp.

Q. Stamp endorsement? A. Yes.

Q. What is the date on it?

A. February 23.

Q. What picture was the corporation having taken, do you know?

A. What picture was the corporation——

Q. Did the corporation order that occasioned payment?

A. Well, I don't think the corporation ordered any pictures for that.

Q. Did it order photographic supplies?

A. Yes; there were some photographic supplies.

Q. What was that?

A. I believe that was for film.

Q. For what?

A. For a 16 MM camera.

(Testimony of Stuart E. Tope.)

Q. I hand you check number 1111 and ask you who the payee is on that check?

A. Mecca Bar.

Q. Where is that? A. Fairbanks.

Q. What was that one hundred dollar check for Berha Tope for, do you know; the one I [296] showed you awhile ago?

A. Probably for expenses.

Q. What kind of expenses?

A. General expenses.

Q. How about check number 1064; that is made out to Bertha Tope, too, is it not?

A. Fifteen dollars, yes, fifteen dollars.

Q. Do you have any idea what that was for?

A. I wouldn't have any idea.

Q. General expenses? A. I imagine.

Q. Gene Flowers ever work for you?

A. Gene Flowers ever work for me?

Q. Yes.

A. I hired him to fly me to Tok; yes.

Q. To fly you to Tok? A. Yes.

Q. What is the Town Club?

A. The Town Club?

Q. Yes. A. I don't recall it.

Q. I hand you Check No. 1134 and ask you to name the payee on that check, please?

A. Clarks Curio Shop in Fairbanks.

Q. Generally, I ask you if there are not a number [297] of these made out to various bars?

A. They're all bars and cafes, just like the Mecca Bar, it had a cafe down stairs and I would

(Testimony of Stuart E. Tope.)

cash a check there and go down and eat, yes, various times.

Q. Check No. 1124, to whom is that made out?

A. Coop Drug in Fairbanks.

Q. Do you have any idea what that would be for?

A. It is all the stuff, it would be just general expense money.

Q. All of these that refer to lodges and bars and curio shops and drug stores would be general expense money? A. That's right.

Q. Well, that's the same thing you said before, isn't it, Mr. Tope, that you just wrote a check whenever you needed money?

A. That's right.

Q. What money went into that corporate account, Mr. Tope?

A. Just monies that I received from the Oaks Construction Company.

Q. Did you put your own salary in there?

A. That's right.

Q. I hand you this black book and ask you what [298] it is?

A. It's a general ledger of the Stuart Construction Company.

Q. I call your attention to the pages that I have marked with paper clips in there and I ask you whether or not those pages bear reference to monies connected with the contract of December 7, 1953, Plaintiff's Exhibit 1?

(Testimony of Stuart E. Tope.)

A. I would have no way of telling you; I'm not a bookkeeper.

Q. Just look at the pieces of paper, Mr. Tope, and tell me whether or not they refer to monies connected with Oaks Construction Company in this particular contract?

A. I would have to have Mr. Marlor down here to prove that; I just can't tell you; I don't know.

The Court: Can't you inspect it and tell whether or not it is a ledger?

Q. Yes, but I can't testify, that is the trouble.

The Court: Well, you can offer it in evidence and then we can all interpret it; there is no use calling another witness, unless there are accounts there that are dubious.

Q. Well, that general ledger that I just handed you, Mr. Tope, which is now Defendant's H, is it not? [299]

The Clerk: Yes.

Q. Was that prepared by Marlor, too?

A. Yes.

Q. At the same time he prepared that financial statement that I called your attention to awhile ago, which is attached to your deposition?

A. Yes.

Q. I invite your attention, Mr. Tope, again, to your deposition, specifically to page 52, line 7.

A. Yes.

Q. And ask you whether or not in answer to the question: "So you got along all right with Crawford," and you answered, "Yes," at the time of

(Testimony of Stuart E. Tope.)

your deposition, at the time your deposition was taken?

A. As far as the job was concerned, yes.

Q. I asked you whether or not you answered “yes” at the time of your deposition, at the time your deposition was taken? A. Yes.

Q. And with respect to Warren Hager, I invite your attention to line 16 on the same page and ask you whether or not at the time your deposition was taken in answer to the question—well, correction, specifically to line 15, and I ask you whether or not with respect to the question: “How did you [300] get along with him,” you answered, “Well, we had a few words”?

A. I answered just a few, yes. Would you repeat the question?

Q. Yes; I will. Your attention, I call your attention to lines 15 and 16 on page 52 of your deposition and ask you whether or not at the time that your deposition was taken, in answer to the question: “How did you get along with him,” meaning Hager, you answered: “Well, we had a few words”?

A. That’s right.

Q. And now directing your attention to line 17 on the same page, at the same time, I asked you whether or not in answer to the question, “Just a few,” you answered, “Well, I would say a few, yes”?

A. On the job, yes.

Q. At the time your deposition was taken, did you answer the question: “Just a few,” by saying, “Well, I’d say a few, yes”?

(Testimony of Stuart E. Tope.)

A. Yes, on the job, yes.

Q. Just answer the question, yes or no, Mr. Tope, did you so testify when your deposition was taken?

A. Yes, on the job, yes.

Q. Will you please answer the question. When your [301] deposition was taken, did you answer the question: "Just a few," appearing at line 17 on page 52, with the words, "Well, I'd say a few, yes"?

A. I so stated here, yes.

Q. And I ask you if at the same time in answer to the question which appears on line 19, "Generally speaking, did you get along all right with him?" and you answered: "As far as I know, yes." Did you so testify?

A. That's right.

Q. And speaking of Vincent Abbott, I invite your attention to page 53 of that same deposition, line 5, and ask you whether or not in answer to the question: "How did you get along with him?" meaning Abbott, you answered, "I never had any words with him." Did you so answer?

A. That's right.

Q. And at the same time did you answer the question: "Got along all right with him?" with the answer "yes."

A. That's right.

Q. Now, I'll call your attention to line 54—beg your pardon, page 54, line 23 of your deposition and ask you whether or not at the time that deposition was taken, in answer to the question: [302] "Well, do you consider it of importance how much you cleared since you were working on an hourly

(Testimony of Stuart E. Tope.)

basis?" and you answered: "No, it wasn't important." Did you so answer?

A. Would you repeat that again; read that again to me, please; what line are you referring to?

Q. I am sorry if I didn't call your attention to the line, it is on page 54, line 23. At the time your deposition was taken, in answer to the question: "Well, do you consider it of importance how much you cleared since you were working on an hourly basis?" you answered, "No, it wasn't important"?

A. That's right.

Q. Now, your equipment you contend, Mr. Tope, was or, at least, your cats were rented on an hourly basis, is that right? A. That's right.

Q. Now, you were paid personally too, isn't that right? A. That's right.

Q. Were you paid on a flat salary or so much an hour? A. On my wages?

Q. Yes.

A. I was paid a flat two hundred and fifty dollars [303] a week.

Q. Just a flat salary. Well, you never had to turn in any time cards or anything like that?

A. I just don't know; I can't tell you that.

Q. Well, if you were on a flat salary, why would you turn in time cards?

A. I think it was requested, if I am not mistaken; I don't know actually; I just don't know.

Q. How long were you on that job? Well, we know you were on there for several months, weren't you? A. Yes.

(Testimony of Stuart E. Tope.)

Q. You tell me you don't remember whether or not you turned in time cards during that extended period?

A. I can't recall.

Q. Can't remember?

A. I just don't know.

Q. Well, with your—is your memory any worse now than it was when your deposition was taken?

A. Four and one-half years is a long time.

Q. I agree with that.

Please answer my question.

A. Repeat your question, please.

Q. Is your memory—is—was your memory any better at [304] the time your deposition was taken than it is now?

A. I imagine it would be about the same.

Q. About the same. I call your attention, Mr. Tope, to page 55 of your deposition, line 1, and ask you whether or not at the time that deposition was taken, in answer to the question: "Did you turn in time cards for the hours worked?" you answered: "For my hours"?

The Court: For what?

Q. "For my hours." Do you so answer?

Mr. Nesbett: That isn't read correctly, your Honor. I submit if it is a question it should be read as a question. Actually the witness asked him a question back.

Q. That's true, he answered my question with a question.

The Court: Yes.

Q. Did you so testify, Mr. Tope?

(Testimony of Stuart E. Tope.)

A. On page 54?

Q. 55, line 1.

A. I asked for my hours, yes.

Q. And did you then proceed to answer the question, calling your attention to line 3 on the same page; well, we will take that first question: "For your personal hours?" and did you answer [305] that question, "Yes, I turned them into Mr. Hager"? Did you so testify?

A. I so testified here, yes.

Q. Well, now does that help to refresh your memory? A. Yes, a little bit, yes.

Q. Well, did you turn your hours in then?

A. I am pretty positive I did; if I said I did, I did.

Q. And by "pretty positive" as I recall, you mean positive?

A. I said, if I said I did, I did; if it says there I did, I'm positive I did.

Q. How many hours did you turn in to Mr. Hager? A. I just can't tell you.

Q. Did you claim any overtime?

A. I just can't tell you; I just don't know.

Q. Well, you know you worked for a flat salary don't you?

A. I know, but he wanted time cards for some reason; I just don't remember what it was.

Q. You are sure of that now?

A. Just as I said, I just don't know positively; I can't swear on the stand because—that I know, because I don't.

(Testimony of Stuart E. Tope.)

Q. You mean you don't know whether he wanted time cards or not? [306]

A. I just can't tell you anything about it.

Q. I call your attention to page 60, line 18, of your deposition and ask you whether or not at the time that deposition was taken, in answer to the question: "Now, after you moved your cats to the job site, did you attempt to obtain a bond, performance bond, to satisfy Mr. Oaks?" you replied, "Yes, I did"? Did you so testify then?

A. Yes.

Q. Now, that was, according to your contention, was it not, after this hourly rate had been agreed upon? A. Yes.

Q. Then why did you try to get a bond if you were on an hourly rate and a salary, will you please tell me?

A. Because Mr. Oaks told me to try, to keep trying to get one.

Q. Just because he told you to?

A. That's right.

Q. Do you know what a bond is, do you, Mr. Tope? A. Yes, I think I do.

Q. Now, I will call your attention to page 71 of your deposition, specifically to line 2, question: "Mr. Tope, you testified on cross-examination, did [307] you not, or did you, that you never got an advance from Oaks Construction Company as a result of any percentage of the amount of work completed as compared to the total amount called for?" and I

(Testimony of Stuart E. Tope.)

now ask you if in answer to that question you testified, "I did not"? Did you so testify?

A. Yes.

Q. And did you then continue to answer the question—calling your attention to line 7, you did not so testify by saying that "I did receive." Did you so testify? A. Here, yes.

Q. And calling your attention to line 9, did you not then proceed to answer the question: "Did you ever get any such advances——"

Mr. Nesbett: That wasn't an answer to a question, that was the question.

Mr. Dunn: I have to admit that it so appears in the deposition, but I think it is obviously a typographical error, don't you, Buell?

Mr. Nesbett: I don't know; I was there when it was taken, but I prefer to go with the deposition, but it is worded as a question from you: "Did you ever get any such advances?" and Tope answered, "No, I didn't get any advances." [308]

Mr. Dunn: I thought you were talking about the one proceeding that?

Mr. Nesbett: Maybe we can start over and save time?

Mr. Dunn: Yes.

Q. (By Mr. Dunn): Did you then proceed—calling your attention to line 9, to answer the question: "Did you ever get any such advances?" with the words, "No, I didn't get any advances"? Did you so testify? A. Yes.

Q. And did you then proceed—calling your at-

(Testimony of Stuart E. Tope.)

tention to line 11, to answer the question: "Did you ever request one?" by replying, "Not that I recall"? Did you so testify? A. Yes.

Q. Is that still your testimony? A. Yes.

Q. Did the Stuart Construction Company request any? A. Pardon?

Q. Did the Stuart Construction Company request any?

A. Yes, I think the Stuart Construction Company requested it, yes.

Q. And that is what you meant there in your deposition? A. Yes. [309]

Q. You didn't request any personally?

A. No, I didn't.

Q. But Stuart Construction Company did?

A. Yes.

Q. And is it true that Plaintiff's Exhibit F is one of those requests? A. That's right.

Q. Did you keep any—excuse me, did you keep any record of your cat time?

A. Mr. Hager said that he would—

Q. Now, just a minute, please, I want you to answer my questions; and I believe I am not trying to be unfair and that this one can be answered yes or no. Did you keep any record of your cat time? Did you? A. Myself, personally?

Q. Yes? A. No.

Q. Did Stuart Construction Company keep any record of its cat time?

A. Mr. Hager said he would take care of that.

Q. Please, Mr. Tope, just answer my question.

(Testimony of Stuart E. Tope.)

Did Stuart Construction Company keep any record of its cat time? A. No. [310]

The Court: Mr. Dunn, are you at a point where we might suspend now until two o'clock?

Mr. Dunn: Yes, sir.

The Court: Court will stand in recess until two o'clock.

(The Court then recessed until two o'clock p.m.)

Afternoon Session

(The Trial Was Continued.)

The Court: Gentlemen, are you ready to proceed?

Mr. Dunn: Shall we proceed, sir?

The Court: Yes, you may.

Mr. Dunn: Your Honor, right aftere you left the bench at noon, discussion arose between myself, and Mr. Nesbett heard part of it, and the Bailiff and the Clerk. Now, we have now offered Defendant's Exhibits A to H and there seemed to be some question as to whether or not some of those exhibits had been offered?

The Court: Well, we will treat them all as in.

Mr. Dunn: They are all admitted into evidence?

The Court: Yes.

Mr. Dunn: That was my understanding, your Honor. I previously offered a certificate [311] of compliance in connection with Stuart Construction Company and you asked that it be held in abeyance.

(Testimony of Stuart E. Tope.)

I have obtained an even later one. The one I now have is dated August 12; it strikes me that it is timely to offer that at this time, which I would like to do.

The Court: Go ahead and offer it. Of course, now, if Stuart Construction Company dissolved, the only authority in the world—dissolved of the—you are shaking your head, what about?

Mr. Dunn: No contention that it is dissolved, your Honor.

The Court: What is the contention then?

Mr. Dunn: I offered to show that it has not complied.

The Court: Maybe it hasn't.

Mr. Dunn: With the Territorial statutes.

The Court: And any person that is aggrieved by it can assert a claim under a contract or repudiate a contract if it is guilty of ultra vires.

Mr. Dunn: We have a Territorial statute to the effect that failing to file annual reports or pay corporate taxes—— [312]

The Court: Deprives it of its charter powers?

Mr. Dunn: No, sir; imposes a penalty of a corporation's being able to neither initiate or maintain a suit; it is for that purpose that I have offered it.

The Court: If that is so, why call my attention to that statute, and if it hasn't complied, why, of course, disabled from maintaining a suit, if that is the statute.

Mr. Nesbett: I got a glance at this the other day and I thought your Honor ruled then that was

(Testimony of Stuart E. Tope.)

a matter of testimony to be brought up at the time of the case.

The Court: That was my viewpoint, exactly, but at this early stage, if corporate rights are challenged and there is a Territorial statute that says it has failed to comply with law, it has no right to go into court and there is a penalty, of course, it is my right to take notice of it.

Mr. Nesbett: Well, he is correct, that it says a corporation can't maintain or commence a suit. The commencement, of course, there is no claim here that when he commenced it the [313] corporation wasn't thoroughly qualified to commence the suit.

The Court: I understand he says the statute says they can't maintain a suit.

Mr. Dunn: Yes.

The Court: And they are authorized to commence it but not authorized to maintain it, that is, if that is the statute, it is already to take that into account, so I gather from both the testimony—both parties are trying to get rid of the corporation and the corporation contract.

Mr. Nesbett: It isn't too much concern to me, but then on the other hand, it has come up before during the trial of cases and the judges have ruled that annual reports, and that is what they are complaining about in this case—not complaining but just saying they haven't filed them, are delinquent; they can be filed even during the trial of the case, and I say this is no time to bring up a matter of

(Testimony of Stuart E. Tope.)

defense. As a matter of fact, the corporation forwarded its two annual reports showing that it was a dormant corporation, but nevertheless it has forwarded them and, therefore, the case is—before the case is over there will be a telegram from [314] the director of finance saying the corporation does comply; even this certificate says it has paid its taxes and it is current in its taxes, but, as I submit, this is no time to bring the matter up as a defense.

The Court: Well, of course, if the statute work main applies in the case and the corporation is out, why we ought to know it. You say the steps have been made to remedy any defect in its authority, and that complies with the statute, and that the statute work main does not apply, why, of course, it can go on and maintain a suit. But I understand here, as I gathered from your proof and that of Mr. Dunn, there is a steadied effort on both sides to eliminate the corporation from this contract.

Mr. Nesbett: It does appear that way and—

The Court: If that is true, why then we are—it is carrying coals to Newcastle, if I may use that homely expression, to go on about the corporate authority. As I understand it, corporation—the rule is now, the Legislature has a right to enact the law that would impair the rights of the corporation if it failed to [315] comply with the law. There is no question about that, but when a corporation is in existence there is nobody that can destroy the authority but the—the State, Territory has its own

(Testimony of Stuart E. Tope.)

means to dissolve a corporation; no court or anybody else can do that. If it exceeds the authority, the only person who can raise the question is the one who is burdened by the fact, that is, the fact that it did exceed its authority. It can repudiate a contract or claim liability in a proper case because it did exceed its authority, because it is guilty—it would be guilty of *ultra vires*. But counsel tells me you have a State statute that is binding upon us; that if a corporation fails to do certain things after it has been incorporated, then it loses its power to maintain a suit or to bring—commence suit or maintain a suit, and you tell me that, if that is true, you are going to follow a precedent here and be corrected by taking it out of the dormant status and give it an active status. Again, if that is true and—moreover so I see no occasion to make a ruling on that question, because somehow I have the impression up to date that the corporation is out of the [316] case anyhow.

Mr. Nesbett: Well, it is further complicated, I don't know whether Mr. Dunn had considered it, but the corporation may not be able to commence the suit or maintain the suit, your Honor, but our statute says that a corporation in spite of not having complied with the payment of taxes and filing of annual reports can always be sued. They have seen fit to counterclaim against this corporation for about \$26,000.00; they couldn't possibly dismiss the case unless they wanted to dismiss their counterclaim; the fact that they have filed a counterclaim

(Testimony of Stuart E. Tope.)

brings the corporation into court and you can't kick the corporation out of court; you have got to settle all the matters connected with it anyway.

The Court: Of course, that is for the State to do in its matter of dissolution. The only question before me is whether it is qualified to maintain its action here. However, I am not ruling adversely; I am not ruling in favor of it, or against it at this time. Counsel has offered these records and at the proper time I will deem it my duty to consider whether or not—if I may [317] call it a statute work main that was used years ago in the common law. The first part of the common law is the parliamentary Act, so I will receive this in evidence and see what effect it will have.

Mr. Dunn: That will be Defendant's Exhibit I, your Honor.

The Court: Defendant's Exhibit I.

Mr. Dunn: If my records are correct.

The Court: I think you are correct about it, at least my notes show that. Now, that makes it an exhibit and tells me what that is.

Mr. Dunn: Yes, sir.

The Court: Certificate?

Mr. Dunn: It is what we term Certificate of Compliance; it is a certificate issued by the Director of Finance of the Territory of Alaska.

The Court: Certificate of Compliance or certificate of failure to comply?

Mr. Dunn: It is called a certificate of compliance, and what it does, it states the degree of com-

(Testimony of Stuart E. Tope.)

pliance; it may show that they fully complied and it may show that they are delinquent. [318]

Q. (By Mr. Dunn): Mr. Tope, I hand you this paper and ask you if it is not entitled, "Financial and Operating Statement of Stuart Construction Company, Inc."? Is it so entitled? A. Yes.

Q. Is that the original of the document that is photostated and attached to your deposition as Defendant's Exhibit 1?

A. I don't know whether this is the original or not; it could be.

Q. Well, is that the same as——

A. It is the same as the one in the deposition, I presume I would have to look and check it.

Q. Well, if there is any question in your mind——

The Court: If you will examine it, let's treat it as if it is the same——

Mr. Dunn: I would like to offer this, your Honor; it is the financial statement.

The Court: Very well. As of what period—what is the date of it?

Mr. Dunn: It reads, your Honor, "Financial and Operating Statement, Stuart Construction Company, Inc., November 12, 1952, through September 30, 1954."

The Court: Now that is November 12, [319] 1952, to November 30——

Q. Through November 30, 1954.

Mr. Nesbett: Your Honor, I have no objection except that that isn't the complete statement fur-

(Testimony of Stuart E. Tope.)

nished on that date for that period of time and I have the complete statement here. I will give it to Mr. Dunn and I insist that it be entered.

Mr. Dunn: I prefer the complete one; I thought I had it, your Honor.

The Court: If that is not a complete statement, why, of course, we will take the complete statement.

Mr. Dunn: Mr. Nesbett, this one that you have bears some notations; I take it, of your own? The part that you object to, these two pages here. Is that not right?

Mr. Nesbett: Yes.

Mr. Dunn: Then may I—do you have any objection to offering these three pages?

Mr. Nesbett: No.

Mr. Dunn: No further questions, your Honor.

The Court: Any recross?

Mr. Nesbett: Yes, your Honor, I have [320] some redirect.

The Court: I meant redirect; I didn't mean recross.

Mr. Nesbett: Your Honor, for the purpose of the record, I should like to read pages 52, 53, and 54 of the deposition of Mr. Tope.

The Court: Now, pages——

Mr. Nesbett: 52, 53, and 54, taken on February 18, 1957, by Mr. Dunn.

Mr. Dunn: Excuse me, your Honor, before he begins that, if I understood your Honor correctly,

(Testimony of Stuart E. Tope.)

an objection lies. I understood your Honor to rule that the deposition itself is admissible?

The Court: That is right.

Mr. Dunn: Only for the purpose of impeaching the witness.

The Court: That is right. Now, then, counsel have a right, has a right, it is all in evidence, he has a right to read any portion of it that he wants to.

Mr. Nesbett: Or all of it; I don't want to read all of it.

The Court: It is all in evidence; he [321] has a right to call any attention to any portion he desires.

Mr. Dunn: I thought it was in evidence only for the purpose of impeachment?

The Court: That is right, but for that purpose counsel has a right to read it.

Mr. Dunn: What he is reading now is directed toward impeachment.

The Court: He has a right to vindicate the witness, rehabilitate the witness, if the deposition goes that far.

Mr. Nesbett: I am using only the points that were used and to read the entire questions and answers.

The Court: I presume that.

Mr. Nesbett: Your Honor, commencing at page 52 of the deposition and up at line 1: "Question: Some point in time, you mean? Answer: Yes. Ques-

(Testimony of Stuart E. Tope.)

tion: And when was that, approximately, as best you can remember? Answer: In May some time."

Mr. Dunn: Excuse me, again, I don't—I have lost you. Are you reading Mr.—what deposition are you reading, please?

Mr. Nesbett: Deposition of Stuart E. [322] Tope, commencing on page 52, at line 1.

Mr. Dunn: May I compare, I don't have that? Oh, I beg your pardon.

The Court: Now, Mr. Nesbett, would you read that first again? I didn't understand the first.

Mr. Dunn: I apologize, sir.

The Court: That is all right, those things will happen.

Mr. Nesbett: Your Honor, the question commences rather disconnected and I only read it on line 1; it doesn't—

"Question: Some point in time, you mean? Answer: Yes.

"Question: And when was that, approximately, as best you can remember? Answer: In May some time.

"Question: That was after you left the job then? Answer: Yes.

"Question: So you got along all right with Crawford? Answer: Yes.

"Question: Did you know a Mr. Warren Hager? Answer: Yes.

"Question: What was he on this job? Answer: General Foreman, I guess.

(Testimony of Stuart E. Tope.)

“Question: What was his relationship to [323] you? Answer: Well, he was my boss.

“Question: How did you get along with him? Answer: Well, we had a few words.

“Question: Just a few? Answer: Well, I’d say a few, yes.

“Question: Generally speaking, did you get along all right with him? Answer: As far as I know, yes.

“Question: Do you know a Mr. Vince Abbott? Answer: Yes.

“Question: What was he on this job? Answer: I will tell you there was so many of them I couldn’t tell you what his capacity was.

“Question: Did he have any relationship to you at all? Answer: Yes.

“Question: And what was his relationship to you? Answer: He was another one of my bosses.

“Question: How did you get along with him? Answer: I never had any words with him.

“Question: Got along all right with him? Answer: Yes.

“Question: And how about a Mr. Allred, do you remember a man by that name? Answer: Yes.

“Question: Was he one of your bosses, too, on this pipeline job? Answer: He was at the [324] other section.

“Question: He was never over you then? Answer: No.

“Question: Were there any other foremen or superintendents on this job whom you considered your boss? Answer: I don’t think so.

No. 16470

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**Transcript of Record
In Two Volumes**

**Volume II
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**Appeal from the District Court
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(Testimony of Stuart E. Tope.)

“Question: How long have you been in the construction business, Mr. Tope? Answer: 16 years.

“Question: During the course of that time, have you had a number of subcontracts or is this the only one you ever had? Answer: This is the only one I ever had.

“Question: This is the only subcontract? Answer: That is right.

“Question: You have been a contractor most of the time rather than subcontractor, is that correct? Answer: That is correct.

“Question: You spoke of computing this \$53,000 odd dollar figure on an hourly basis, who hired you on an hourly basis? Answer: Mr. Oaks.

“Question: And at that time, did you set unit prices for all the equipment that you were going to furnish? Answer: No; we didn't.

“Question: Was there any agreement as to [325] how much equipment you would furnish? Answer: I don't believe there was anything said about it.

“Question: Did you agree to a wage that you would be paid personally? Answer: Yes.

“Question: I don't recall, Mr. Tope, did you ever tell me how much of this land you cleared before you left the job; I remember some discussion between us about it, but I don't remember what you answered or if you answered; do you recall? Answer: No; I don't. I said I don't know; I just don't know.

“Question: That is right, I remember now, we

(Testimony of Stuart E. Tope.)

were dickering in feet and miles and so on. You said you did not know? Answer: That is right.

“Question: Well, do you consider it important how much you cleared since you were working on an hourly basis? Answer: No; it wasn’t important.

“Question: Did you turn in time cards for hours worked? Answer: For my hours?

“Question: Well, we will take that first. Yes, for your personal hours? Answer: Yes; I turned them in to Mr. Hager.

“Question: How about for your equipment? Answer: Mr. Hager turned that in.

“Question: You didn’t turn anything in [326] yourself? Answer: No.

“Question: Well, now, this fifty-three thousand odd dollar figure, is that taken from Hager’s records then? Answer: It was taken off the payroll records, according to the men who were on the cats at that time.

“Question: Payroll reports kept by whom? Answer: Oaks Construction Company.

“Question: Did you give any notice to the contractor of your claim against Oaks? Answer: I gave it to the N. C. Company.

“Question: And only to the N. C. Company? Answer: I don’t remember.

“Question: How much notice, if any, did you give prior to the time that you stopped work on the pipeline job? Answer: I can’t tell you that.

“Question: Why? Answer: I just don’t know.

“Question: Do you remember whether it was a

(Testimony of Stuart E. Tope.)

fairly long period or a fairly short period? Answer: I just don't know." That is at the top of page 56, your Honor. I have no particular desire to read any more of that deposition.

Redirect Examination

By Mr. Nesbett:

Q. Now, Mr. Tope, during the time you were employed on this clearing job, where would [327] you take your meals and spend your nights?

A. It depended on where I was. If I was after parts in Fairbanks, why I would stay various places.

Q. Did you have any home in that area that you could go to and cook your meals and sleep?

A. No.

Q. Well, then, where would stay at evenings?

A. In roadhouses.

Q. And those checks that Mr. Dunn was questioning you about, were those checks you passed as you were traveling up and down the highway, or for your meals and lodging in these places?

A. That is right.

Q. Did you pay your expenses out of the two hundred and fifty per week that you got from Mr. Oaks?

A. While I was in transit along the—above—like going to Fairbanks and back, yes, but the—they did deduct some of it—they were allowed, I

(Testimony of Stuart E. Tope.)

think, five dollars and some cents out of my pay check a day towards my room and board.

Q. That's when you were located in Tok?

A. That is right, in Dot Lake.

Q. You got two hundred and fifty dollars a week, but [328] your board was deducted from it?

A. A certain portion of it.

Q. Now, did you ever submit any expense account for the cost of your meals or travel up and down the highway when you were going in and out of Fairbanks for parts? A. I did not.

Q. Did you have any other bank account—did you have a personal bank account at that time?

A. I did not.

Q. Now, you were asked as to whether or not you had made any allowance for gas and oil consumption on the trucks and pickups that were used on the job. You did not make an allowance or any itemization for expenses in your Exhibit 2, which is the cost of operations analysis, did you?

A. No; I didn't.

Q. Was your monthly rental on those pieces of equipment based strictly on what you considered a fair price to let some contractor have it and use it? A. That's right.

Q. Actually, the gas and oil used in those pieces of equipment came from the five hundred [329] gallon Dodge truck fuel tank or the gasoline drums that were used on the job, didn't they?

A. That is right.

(Testimony of Stuart E. Tope.)

Q. That gas and oil was paid for by Oaks Construction Company, wasn't it?

A. That's right.

Q. Did you testify in response to a question on cross-examination that all of the equipment used on that job, or that you purchased from Northern Commercial Company was used equipment?

A. Yes.

Q. Inviting your attention, specifically to the Dodge truck, was that used equipment when you first got it and put it on the job?

A. That was brand new.

Q. May I see Exhibit F, please?

I hand you Exhibit F, Mr. Tope, do you recall the occasion when you signed that exhibit, which is a request for payment for work cleared along the right of way up to a point?

A. Yes.

Q. Who presented that to you?

A. Mr. Crawford wrote this.

Q. Would it be fair to say that that was presented to you on or about the date indicated [330] on it?

A. Just about as I remember.

Q. And what is that date, sir?

A. That's the 6th of February, 1954.

Q. And where did you sign that?

A. I believe it is—was right along the right of way.

Q. Did Mr. Crawford write out in your presence or bring it to you?

A. He wrote it out in my presence.

(Testimony of Stuart E. Tope.)

Q. Did you ever receive any money for the work set out in that request? A. Never have.

Q. Does that exhibit indicate that it was approved by Mr. Crawford? A. Yes.

Q. Did you give it back to Mr. Crawford after you signed it? A. Yes.

Q. Did you have a copy for your files?

A. No, I did not.

Q. Have you ever seen that request since the date you signed it and until today?

A. No, I never have.

Q. Did Mr. Crawford ever present you any other such statements concerning the amount of clearance [331] you had accomplished as to a percentage, as to the mileage or footage?

A. I can't recall.

Q. Were you ever paid anywhere based on the number of feet you had cleared along that right of way? A. No, I was not.

Q. Mr. Tope, you brought some stock certificates of Stuart Construction Company into court yesterday, did you not? A. Yes, I did.

Q. Were those certificates procured from a safety deposit box during the lunch hour?

A. Yes, they were.

Q. Who procured them?

A. My wife, Mrs. Tope.

Q. What did you tell her with respect to the stock certificates in your box?

A. I told her to take what Stuart Construction

(Testimony of Stuart E. Tope.)

Company stock certificates was in there and bring them here.

Q. Did you tell her to get them all?

A. I told her to get them all.

Q. Have you ever had the certificate issued to Mr.—is it Maynick? A. Maynick. [332]

Q. Yes, your brother-in-law?

A. No, I never have.

Q. Who has it? A. He has it.

Q. To your knowledge, do you have the certificate that was issued to Mr. Sanders, the attorney? Have you, to your knowledge, ever had that one share that was issued to Mr. Sanders?

A. Not to my knowledge.

Q. Now, who drew those minutes of the corporation that have been read into evidence and admitted into evidence? A. Mr. Sanders.

Q. Mr. Tope, when this contract of December 17, 1953, was signed by you, and Mr. Oaks, was there any dickering or negotiating or bidding between you and Mr. Oaks, as to how much you were to get per foot for that clearing?

A. Oh, he said we got to talk about it and we arrived at a six-and-one-half cent figure.

Q. Did he set the figure, or did you arrive at it by dickering or negotiating?

A. We arrived at the figure together.

Q. Did Mr. Oaks tell you how much he was getting per foot for the clearance? [333]

A. He did not.

Q. Do you know? A. I have no idea.

(Testimony of Stuart E. Tope.)

Q. May I see Exhibit 2, please? May I see Exhibits 2 and 3?

Mr. Tope, I will hand you Exhibit 3 and ask you to look at the dates and hour computations made on the last three pages of that exhibit; do you see them? A. Yes.

Q. Who prepared those computations?

A. I prepared these myself.

Q. And what did you do with them after you prepared them?

A. I gave them to a Mr. Hubbard, Wayne Hubbard.

Q. What do those computations show?

A. Well, it shows the number of hours worked during the week per piece of equipment.

Q. How did you prepare or determine the hours per week that each piece of equipment was used?

A. I took the man that was working on the piece of equipment and took it from the statements that Mr. Oaks had sent to me weekly.

Q. Do you know now, Mr. Tope, the last date that you received any wages—your wage of \$250.00 [334] per week for working on that pipeline?

A. It was sometime in around the first of April, but the exact date I can't tell you.

Q. Did you discontinue any work on the line after you received no further payments?

A. No, I did not.

Q. Did you continue the same sort of duties you had been performing? A. Yes.

(Testimony of Stuart E. Tope.)

Q. Generally, when that operation first commenced on or about January 3, 1954, what was the general nature of your duties over a given day?

A. I would help grease the cats, drive the 21½-ton truck, pump fuel into them after the men got through working; I would take the men out on the job and bring them back in the evening, go after fuel and oils and lubricants.

Q. Where would you go to get that?

A. I would have to go to Tok to Mr. Bayless' place.

Q. What else generally were you occupied with?

A. Chasing parts, going to Fairbanks after parts, and coming back.

Q. Did you yourself perform any repairs or parts replacements on the caterpillars?

A. Yes, I did. [335]

Q. And did that type—were you busy eight hours a day doing that sort of thing?

A. Yes, I was.

Q. How long did you continue doing that?

A. Well, the whole length of the job.

Q. Well, did you continue to do that after your pay was discontinued, the pay of \$250.00 per week?

A. I went up and down the line seeing that—doing the best I could to keep the job going, yes.

Q. Now, I believe you testified, did you not, that you were there on the pipeline clearing area long after the clearing itself was actually finished; is that correct?

A. That is correct.

Q. What were you doing there?

(Testimony of Stuart E. Tope.)

A. Well, I was trying to pick up enough work to live on and I cleared an area strip for the Tok Lodge to help pay the bill.

Q. Well, now actually, at the time you left the clearing job, you had only one cat in operation, didn't you? A. That is correct.

Q. And you—did you take that cat with you when you left the job? [336]

A. Not at that time, they had moved out. They had moved all the rest of the men off the job and I was still there. I—and I moved the last cat, I imagine, about a week after the work was finished.

Q. And do you have all that, the hours you charged for the last week of April and up to May 1, with hours actually put on your cat by employees of Oaks Construction Company?

A. To the best of my knowledge, yes.

Q. Where was that cat after May 1, was it—where did you get it?

A. Well, it was away out in the—along the right of way and with the starting motor out of it and it wasn't—the crankshaft was—the bearings had—

Mr. Dunn: I object, not responsive; he asked him where it was.

Mr. Nesbett: He was just saying right along the right of way.

The Court: Counsel makes objection and I have forgotten, did you ask him where it was? Now, he could answer that and then, of course, you could ask him about these other matters. [337]

(Testimony of Stuart E. Tope.)

Q. (By Mr. Nesbett): What did you do with the cat?

A. I had to take another cat out and start it and I took it back to Dot Lake.

Mr. Nesbett: No other questions, your Honor.

The Court: No other questions? Is there any recross?

Mr. Dunn: None, your Honor, thank you.

The Court: No recross. Call your next witness.

(Whereupon Mr. Tope was excused.)

THOMAS K. DOWNS,

called as a witness for and on behalf of the Plaintiff, and being first duly sworn, testifies as follows on

Direct Examination

By Mr. Nesbett:

Q. Is your name Thomas Downs?

A. Thomas K. Downs.

Q. Thomas K. Downs. Where do you live, Mr. Downs? A. Fairbanks.

Q. And what is your business?

A. Credit manager of the Northern Commercial Company in Fairbanks.

Q. How long have you held that position? [338]

A. Sixteen years.

Q. I'll hand you Exhibit 4 and ask you if you recognize those papers?

A. Yes, I recognize them.

Q. What are they, Mr. Downs?

A. These are rental contracts with an option to

(Testimony of Thomas K. Downs.)

purchase and into which we entered with Stuart Tope.

Q. Do you recall the general times that those agreements were entered into? Do you remember the occasions when the equipment was sold or rented to Mr. Tope? A. I recall the occasion.

Q. How long have you known Mr. Tope?

A. Approximately four and a half to five years.

Q. And can you advise the Court how much was paid by Mr. Tope as rental under those contracts?

The Court: Under all these contracts?

Q. Yes.

The Court: As I recall, it was approximately \$8600.00.

Q. Was the total rental payment on all of that equipment? A. Yes.

Q. Do you know approximately when those payments [339] were made?

A. As I recall, one payment was made in August and I believe another payment was made in September or October, 1953.

Q. Do you know where that money came from that was used to pay on those contracts?

A. Yes, I do.

Q. Where?

A. Three thousand some odd hundred dollars came from the assignment we had with Mr. Tope for work he had done for the Munter Construction Company, and the balance came from the assignment we had from the Oaks Construction Company.

Q. Now, you recall, do you not, receiving an

(Testimony of Thomas K. Downs.)

assignment from Mr. Tope or Stuart Construction Company, Inc., to Northern Commercial Company of all funds due him for work done, either snow removal or pipeline clearing work; do you recall receiving such an assignment from Mr. Tope?

A. Yes, I do.

Q. And Exhibit D, would that be the assignment or a copy of the assignment?

A. That is a copy of the assignment.

Q. Had you previously prior to that assignment [340] received similar assignments from Mr. Tope or Stuart Construction Company, covering work for other people or contracts?

A. Yes, we had.

Q. And was that a customary way of collecting payments on equipment sold to Mr. Tope?

A. Yes, it was.

Q. And, Mr. Downs, did Northern Commercial Company ever receive any money from, as equipment rental on the equipment purchased by Mr. Tope, by reason of that assignment?

A. Yes, I believe, we received, as I understand it, approximately five thousand dollars on a settlement for ten thousand dollars that was entered into by a representative of our company from Seattle and Mr. Oaks.

Q. Now, would that be, to your knowledge, the only payment your company would have received from—or rather received as payment on those rental options to purchase contracts?

A. To my knowledge that is the only one.

(Testimony of Thomas K. Downs.)

Q. Do you recall discussing with Mr. Tope, the possibility of collecting monies from him for work he had performed on the pipeline in approximately June of 1954? [341]

A. Yes.

Q. Where did such discussions take place.

A. Took place in my office in Fairbanks.

Q. And did—was anything done in connection with those discussions; was Mr. Tope able to pay you anything on the rental purchase contracts?

A. No, he wasn't.

Q. Did he explain why he couldn't pay?

A. Yes, he did.

Q. Did you do anything as a result of those conferences with Mr. Tope, in connection with payments?

A. Yes, I went to see our attorney in Fairbanks, with Mr. Tope, in an effort to find some basis for settlement.

Q. And did you do anything in connection with obtaining payments for Northern Commercial Company for the work Mr. Tope had done on the pipeline?

A. Yes, I wrote a letter to Williams Brothers—McLaughlin & Marwell, who were the prime contractors on the pipeline.

Mr. Dunn: Your Honor, I object and move to strike so much of the answer that the witness has given; I don't see what possible [342] relevancy the correspondence between Northern Commercial Company and Williams Brothers-McLaughlin & Marwell would—

(Testimony of Thomas K. Downs.)

The Court: Counsel asked what move he made towards this equipment when Mr. Tope told him he couldn't pay anything on it. Now, he says he wrote, he can't tell what he wrote; he can just say he wrote.

Mr. Nesbett: Well, your Honor, I was under the impression he could tell, Williams-Marwell are a party to the case and Mr. Dunn represents them. They are the prime contractor and they're supposed to have notice under the Miller Act.

The Court: They are named as defendants, yes, then he can tell what was said in the letter.

Mr. Nesbett: You mean he——

The Court: Yes, he can; I didn't——

Q. (By Mr. Nesbett): Did you send a letter then to Williams Brothers? A. Yes, I did.

Q. Do you have a copy of that letter that you mailed?

A. It is here in court, I understand, yes. [343]

Q. Do I have it here in this brief case of yours?

A. Yes.

Q. Can you find that copy of that letter you wrote to Williams Brothers?

Mr. Dunn: I renew my objection, your Honor, on the ground of relevancy. Suppose that he did write Williams Brothers, what does it have to do with how much money is owed between Tope and Oaks?

The Court: It refers to the matter of adjustment on these claims and it may not be relevant at all; I can't tell at this time.

(Testimony of Thomas K. Downs.)

A. I have here my copy of the letter I wrote to Williams-McLaughlin and Marwell.

Q. (By Mr. Nesbett): What is the date of that letter, Mr. Downs? A. June 16, 1954.

Q. And to whom is it addressed?

A. Williams Brothers-McLaughlin & Marwell.

Q. Who signed the letter?

A. I signed it.

Q. And was the letter sent regular mail or in any special manner?

A. It was sent registered mail with return receipt.

Q. Was return receipt received on it? [344]

A. I don't know for sure.

Q. Did you receive a reply?

The Court: If it were mailed, it presumes they received it, if he stamped it and mailed it, why the presumption of the law is that they received it.

Q. Did you receive a reply from him later on to this letter? A. Yes, I did.

Q. We offer this in evidence, your Honor.

Mr. Dunn: Well, your Honor, I object to its admissibility again, on the grounds of relevancy.

Q. I suppose I will have to submit it to you before you can—

The Court: Well, I don't care to look at it; the objection is overruled at this time. If it does not become relevant and material you can move to strike it out.

The Clerk: It will be 7.

The Court: Plaintiff's Exhibit 7.

(Testimony of Thomas K. Downs.)

Mr. Nesbett: I should like to read this letter, your Honor.

The Court: Very well. [345]

Mr. Nesbett: (Reading Exhibit 7):

“Fairbanks, Alaska

June 16, 1954

Williams Brothers, McLaughlin-Marwell

Joint Ventures Office

Tok, Alaska

Attention: Mr. Curr

Gentlemen:

“Enclosed is a statement of our account with Stuart E. Tope d/b/a Stuart Construction Company, Inc., covering material, supplies, and equipment rental applicable to the Haynes-Fairbanks pipeline clearing contract. As itemization of parts and supplies furnished is necessarily lengthy, it is not presented herewith but can be made available at any time.

“All tractors and the truck were furnished under a formal written rental agreement, properly filed. Further, Mr. Tope assigned to us all his earnings under pipeline clearing contract, which assignment was accepted by Oaks Construction Company to December 2, 1953. The original of this accepted assignment is in our files.

“Please note the last item on the statement is a charge for \$4,000.00 for a used replacement engine for one of the rented tractors. The original engine

(Testimony of Thomas K. Downs.)

was damaged beyond repair by the contractor while on the job. We felt that charging the cost of the new [346] engine would be unfair, and, therefore, arrived at the \$4,000.00 figure as being reasonably the cost of a new engine less the depreciation on the original engine, to arrive at a figure representing the expected remaining life of original engine under normal use.

“We shall much appreciate your early consideration of the enclosed statement and ask that you advise us as soon as possible your position in this matter.”

“Sincerely yours,

NORTHERN COMMERCIAL COMPANY
T. K. DOWNES, Credit Manager.”

And attached, which I will not read unless counsel desires it, is a statement of Northern Commercial Company outlining tractor rental on various pieces of equipment and engine replacements; the total of which is \$22,865.97.

Q. Now, Mr. Downs, did you say that you received——

Mr. Dunn: Now that you have heard it, your Honor, I renew my motion, only this time it will have to be strike.

The Court: Now that I have heard it, I will be inclined to overrule your motion permanently. I don't know if you will have the right to strike it out later, but it appears [347] that it may be connected up in a way that makes it very competent

(Testimony of Thomas K. Downs.)
and relevant.

Q. (By Mr. Nesbett): Mr. Downs, did you say that you received a reply from Williams Brothers to that letter? A. Yes, I did.

Q. Do you have a copy of that letter that you received? A. I think I have the original.

Q. Will—

A. I have the original letter here.

Q. And what is the date on that letter?

A. July 28, 1954.

Q. And to whom is it addressed?

A. To Northern Commercial Company, attention, T. K. Downs.

Q. And did you receive that letter at your office in the Northern Commercial Company in Fairbanks, Alaska, on or about the date indicated on the letter? A. Yes, I did.

Q. Your Honor, we offer this letter into evidence.

Mr. Dunn: Well there are two objections, your Honor, the same one I made with respect to—I am satisfied that you will overrule, but [348] the same one I made with respect to Exhibit 7 and also, here, this man's signature hasn't been identified. The only thing we know is that he said he got it at his office.

The Court: It purports to be a reply to a letter addressed to the prime contractor. Is that what counsel has said?

Mr. Nesbett: Maybe, I didn't hear you, your Honor?

The Court: I say, it purports to be a reply from the prime contractors?

(Testimony of Thomas K. Downs.)

Mr. Nesbett: Yes.

The Court: To the letter that was addressed to them on June 16; this is July 28.

Mr. Dunn: That is just the point, your Honor, without some further identification that is all it does; it just purports to be.

The Court: It purports to be doesn't make it competent; now, I don't know——

Mr. Dunn: All right, sir.

The Court: It may appear later on that it is irrelevant and immaterial, and if so, why you can move to strike it out.

Mr. Dunn: It may be a forgery, your Honor, but his client would know. [349]

The Court: Yes, if it purports to be a reply from the prime contractor that would be sufficient.

Mr. Nesbett: I would like to read Exhibit 8, your Honor. "Williams Brothers Company," letterhead, "Engineers, Constructors, General Office, National Bank of Tulsa Building." Attached to it is a reference to a bond number and a statement with a copy of the letter written to Carl E. Oaks, by Williams Brothers, and it's dated July 28, which is on Williams Brothers letterhead, dated, however, "July 28, 1954, at Tok Junction, Alaska, addressed to Mr. Carl E. Oaks, Oaks Construction Company, P. O. Box 1452, Anchorage, Alaska, subject: Stuart E. Tope, d/b/a Stuart Construction Company"——

Mr. Dunn: Your Honor, how many letters has he offered in evidence?

The Court: He offered that letter and attach-

(Testimony of Thomas K. Downs.)

ment, and this one apparently is very competent, because it was addressed to Mr. Oaks.

Mr. Dunn: Well, I don't even know which one it is; this is a new one.

Mr. Nesbett: I handed it to counsel; [350] I thought he looked at it.

Mr. Dunn: You were talking about the one letter from Williams Brothers-McLaughlin?

Mr. Nesbett: They're all stapled together.

The Court: As I understand, it was an exhibit to the reply to the letter of June 16?

Mr. Nesbett: Yes, sir.

Mr. Dunn: No further objections that I haven't already made to the original, your Honor, and the original is already in, so——

The Court: Very well.

Mr. Nesbett: (Reading Exhibit 8.)

“Dear Mr. Oaks:

“Reference is made to our letter of June 11th, your reply of June 23rd and several conversations with you and Mr. Hancock regarding the unsettled accounts and obligations of Stuart Tope and/or Stuart Construction Company in connection with his operation for clearing the right of way under our contract with the Corps of Engineers.

“We have been informed that some of the obligations, referring to board and lodging that were listed in our letter of June 11th, have been paid; but, also, we have been informed that others listed

(Testimony of Thomas K. Downs.)

have not been paid and we have been advised of revised and additional amounts of these existing [351] obligations. As Mr. Barnes told you, we recognize your right to determine the correctness of these charges as a liability under our contract, but that since they have been reported to us as unsettled liabilities to the contract we are obligated to record them and report them to your bonding company.

“We have been informed of the revised and additional amounts of these obligations and the revised list of them, according to our present information, is as follows: Northern Commercial Company, rental on three tractors and one truck, and repair parts: \$22,865.97; McLaughlin, Inc., rental on three tractors, repairs and hauling: \$10,030.12; Babler-Rogers, rental on one tractor: \$2,000.00; Franklin Mining Co., (Howard Bayless) fuel oil and lubricants: \$3,000.00; C. A. Bicknell, welding: \$198.75; Art Sills, hauling tractors: \$425.00; Tommy Hyatt, rental of tanker: \$525.00; Yukon Equipment Co., repair parts: \$600.00; Post’s Service, repairs: \$146.12; Forty Mile Roadhouse, repairs: \$419.81; Tok Lodge, storage and repair parts: \$660.77. Total amount, \$40,871.54.

“As we have previously mentioned, we have not attempted to verify the correctness of these obligations, but they have been reported to us as unsettled obligations under the right of way clearing contract in connection with our Contract DA-95-507-eng-573 with the Corps of Engineers. [352] Your bond to

(Testimony of Thomas K. Downs.)

Williams Brothers Company under this contract is American Automobile Insurance Company Bond Number S 4634222. By copy of this letter we are informing them of this matter at their office at 364 Stuart Building, Seattle, Washington."

"Very truly yours,

WILLIAMS BROTHERS
COMPANY,

By ROBERT H. KERR,
Office Manager.

RHK:agb

cc: American Automobile Insurance Company,
Seattle, Washington.
Williams Brothers Company,
Tulsa, Oklahoma.
Travelers Insurance Company.
Northern Commercial Company,
Fairbanks, Alaska." [353]

Q. (By Mr. Nesbett): Now, Mr. Downs, did you address any communications to Mr. Oaks, in connection with Northern Commercial Company's predicament or payments on these rental options to purchase contracts?

A. I believe in April, 1954, we wrote a letter to Mr. Oaks, making formal demand upon him for the payment for the assignment which we had received from him.

Q. And did you ever, subsequent to that demand, make any other demand on him?

(Testimony of Thomas K. Downs.)

A. I don't believe we did directly, our attorney, I believe, did in Fairbanks.

Q. And who is your attorney in Fairbanks?

A. The firm of Collins and Clasby, Mr. Charles Clasby.

Q. And was he instructed to make a demand on Oaks Construction Company?

A. Yes, I believe he was.

Q. Well now, Mr. Downs, have you at my request calculated the total amount of monies called for under these five rental options to purchase contracts, which are Exhibit 4?

A. I don't know if you directly requested me to do so, but it has been done.

Mr. Dunn: Your Honor, I don't care, [354] I don't think it makes any difference but I don't see the relevancy.

The Court: Well, apparently it is competent, because under this rental contract by assignment, I understood Mr. Oaks assumed some liability on those.

Mr. Dunn: But the N. C. Company isn't suing Mr. Oaks?

The Court: I understand that, but it is all mixed up with this settlement and it all refers to the obligations under the assignments. The assignments have been offered here in evidence.

Mr. Dunn: Now, if he limited his question to the monies that were due, during the period of the pipeline work, I agree.

The Court: The question was, what obligations

(Testimony of Thomas K. Downs.)

has Mr. Oaks assumed under these four contracts of this equipment.

Mr. Dunn: I didn't understand that; I thought he wanted to know the total amount of monies due under the purchase agreement; I think it should be tied to this particular job before it has any relevancy.

The Court: Of course, the assignment [355] only appertains to this job, Mr. Oaks assumes the liability on this job in connection with Mr. Tope, and that is exactly what I understood counsel asked the witness.

Mr. Nesbett: Yes.

Q. (By Mr. Nesbett): Mr. Downs, approximately what was the total called for to be paid under those five rental options to purchase contracts?

Mr. Dunn: Now, the same objection, your Honor, the total amount called to be paid under those contracts, without limit. Now, it should be limited to this job.

The Court: Let him tell that and on cross examination you can have him limited on this job, if it goes beyond the job.

A. Well, the only answer I could give would be relative to the pipeline job. That was approximately \$22,800, and something, some odd dollars, I don't know.

Mr. Nesbett: Your Honor, all I asked him to do was give an approximate total of the amount called for to be paid in each of the five exhibits, which are

(Testimony of Thomas K. Downs.)

in Exhibit 4. Now, they have been admitted as exhibits, the Court [356] has every right to know the total and how much was paid on them.

The Court: And I have so ruled.

Mr. Nesbett: I just can't conceive counsel objecting on the grounds of relevancy, considering all the——

The Court: I have overruled the objection.

Q. (By Mr. Nesbett): What was the total amount called for to be paid under the five option to purchase agreements?

A. The best answer I could give——

Q. If the option to purchase was exercised, how much would have to be paid to Northern Commercial Company?

A. I didn't understand the question.

Mr. Dunn: Even if counsel can't understand it, I am going to make objection again. Now, the witness has just testified that the only information——

The Court: Well, just tell me right quickly what your objection is?

Mr. Dunn: My objection is that his question goes beyond the scope of this particular project. [357]

The Court: Well, apparently the last question does, but if it does, why then we will limit it to this project. Let him answer and then we will get down to this project.

A. Would you ask that question again, please?

Q. What was the total cost—what was the—how

(Testimony of Thomas K. Downs.)

much was to be paid under all of those five contracts, if the option to purchase was exercised?

Mr. Dunn: Same objection.

The Court: Well, objection overruled at this time. Let him answer and then let's get along.

A. I will have to look at the contracts to see.

Q. Didn't you calculate it in my office this morning at my request?

A. No, I think you calculated it, if I am not mistaken.

Q. Do you know how much was paid as rental to Northern Commercial Company on those contracts?

A. Yes.

Q. What amount?

A. \$8600.00, as I recall, approximately.

Q. Now, Mr. Downs, were you involved in attempting to arrange any meeting in Fairbanks between Oaks Construction Company and Stuart E. Tope, in order to iron out the differences in [358] connection with what was due, under this pipeline clearing dispute?

A. Yes, I was.

Q. Was any agreement, tentatively any meeting date set up?

A. Yes, a meeting date was tentatively set up.

Q. During what month of what year?

A. As I recall, it was in July or possibly August, of 1954; I don't remember the exact month.

Q. And was Mr. Oaks or Oaks Construction Company advised of the date?

A. Yes, they were.

Q. Was Mr. Tope advised of the date?

(Testimony of Thomas K. Downs.)

A. Yes.

Q. Did both of those parties show up for the meeting? A. No.

Q. Tell the Court what happened on the day that the meeting was supposed to have been held?

A. On the day the meeting was supposed to have been held, Mr. Tope appeared at the proper time and place, but nobody appeared for the Oaks Construction Company.

Q. Did anyone ever appear on behalf of the Oaks Construction Company?

A. Yes, Mr. Hancock appeared for the Oaks Construction [359] Company the day before the meeting was to be scheduled.

Q. And did Mr. Hancock know of the date the meeting was actually scheduled to be held?

A. Yes, I think he knew.

Q. Did Mr.—who was Mr. Hancock?

A. Mr. Hancock, as I understood it, was office manager and accountant for the Oaks Construction Company.

Q. Did Mr. Hancock tell you why he would not attend that meeting that was to be held the following day? A. Yes.

Q. And what did he say?

A. He said that he was not interested in meeting with Mr. Tope, and that Mr. Oaks was not interested in meeting with Mr. Tope, and they didn't see why it was necessary to have a meeting at all.

(Testimony of Thomas K. Downs.)

Mr. Dunn: Will you read the last part of that answer back?

(The Reporter read the last answer.)

Q. (By Mr. Nesbett): Was any meeting ever held between Oaks Construction Company and Northern Commercial [360] Company?

A. Not to my knowledge.

Q. Now, Mr. Downs was—I believe you testified that you believe five thousand dollars was received by Northern Commercial Company by reason of that assignment from Stuart Construction Company?

A. As I understand it, that's right.

Q. Now, do you know the circumstances of the receipt of that money? A. Yes.

Q. What are they?

A. After it was established that we had \$22,800, and some odd dollars coming, that is, established as far as we were concerned on account of the rental of this equipment, because of the apparent dispute between Mr. Tope and Mr. Oaks, a man from our Seattle office, by the name of Mr. Truman Sage, appeared in Fairbanks and negotiated a settlement with Mr. Carl Oaks in the office next to mine; and the basis of the settlement was the complete payment for the caterpillar parts furnished and one-half the rentals that were accrued, which amounted to ten thousand and some odd dollars. And on that, [361] I understand that Mr. Oaks has paid five thousand dollars.

Q. Now, do you have a copy of the settlement as it finally took place, took form?

(Testimony of Thomas K. Downs.)

A. Yes, I have.

Q. And will you produce a copy, please?

A. Yes.

The Court: Very well, we will take a recess.
Court will stand in recess for ten minutes.

(At 3:10 p.m. the Court took a ten minute recess.)

After Recess

The Court: You may proceed.

Q. (By Mr. Nesbett): Mr. Downs, did you find the written copy of the settlement that you were discussing before the recess?

A. Yes, I did.

Q. And do you have it there? A. Yes.

Q. What is the date on that settlement?

A. October 4, 1954.

Q. And is it signed by any persons?

A. It is signed by Truman Sage for the Northern Commercial Company, and Carl E. Oaks of the [362] Oaks Construction Company.

Q. And is there anything else attached to it?

A. A letter of transmittal from the Oaks Construction Company.

Q. Your Honor, we offer this in evidence.

Mr. Dunn: I have seen it, Mr. Nesbett.

The Clerk: Plaintiff's Exhibit 9.

The Court: Do you want that marked as one exhibit?

Mr. Nesbett: Yes. Your Honor, I would like to read Exhibit 9.

The Court: Very well.

(Testimony of Thomas K. Downs.)

Mr. Nesbett: (Reading Exhibit 9:)

“Northern Commercial Company, Alaska’s Pioneer Merchants, Executive offices—Colman Building, Seattle 4, Washington, Branch—Fairbanks.”

Date: “October 4, 1954

Mr. Carl Oaks

Oaks Construction Company

Anchorage, Alaska

Gentlemen:

“Confirming our conversation today we agree to a compromise settlement of one-half the rental prior to April 15, 1954, and the full open account which on June 15 amounted to \$5,465.97. Thus the June 15 statement is revised to the following: [363]

D8 Serial No. 1H8977	\$ 3,500.00
D8 Serial No. 1H9172	3,990.00
D8 Serial No. 1H9091	1,600.00
Truck 2-Ton Dodge	1,575.00

Rentals	\$10,665.00
1/2 Settlement	5,332.50
Open Account—June 15	5,465.97

Total\$10,798.47

“Yours very truly,

NORTHERN COMMERCIAL
COMPANY,

Truman Sage,

Caterpillar Department.”

(Testimony of Thomas K. Downs.)

"If this is in agreement with our conversation, will you please sign the acknowledgement."

Signed: "Carl E. Oaks

Oaks Construction Company, by
Carl Oaks." [364]

Q. (By Mr. Nesbett): Now, Mr. Downs, will you explain to the Court briefly how the total rental charges set out there by Northern Commercial Company were arrived at?

A. I couldn't say how they were arrived at.

Q. Do you know whether or not those rental charges that are mentioned in that settlement as constituting a certain amount were the rentals claimed to be due by Northern Commercial Company on the rental option to purchase contracts, which you have looked at and which you have before you, for the months used on the pipeline job?

A. Yes.

Q. Wasn't that the criteria used? A. Yes.

Q. Will you explain it to the Court, if it wasn't explained by now of what I fully said?

A. I don't understand.

Q. Do those rental options to purchase contracts set out the monthly rental to be paid for the use of each piece of equipment? A. Yes, they do.

Q. Do those rental options to purchase contracts [365] state that no rental payments would be required from the month of November until the month of May of each year, if the equipment was not used at all?

(Testimony of Thomas K. Downs.)

A. I don't know if the rental agreements say that, but that was the understanding.

Q. Will you look at them and see?

A. Yes.

Q. And the payment schedule on each piece of—on the contract, as to each piece of equipment, doesn't it state that rentals will be deferred during—or rather between the months of November to May?

A. Yes, it does.

Q. Now, how did Northern Commercial Company then compute the rentals claimed to be due for use on this pipeline job? Did they arrive at a certain amount of number of months and use the rental purchased in the contract?

A. I don't know how they were computed; I didn't compute them.

Q. What are the total rentals required to be paid according to that settlement agreement?

A. One half of the total of it amounting to five thousand, three hundred, thirty-two dollars, [366] fifty cents.

Q. The total amount of rental that they started out with was what amount?

A. Ten thousand, six hundred sixty-five dollars.

Q. And that was the amount that Mr. Truman Sage of Northern Commercial Company thought was due for equipment for the months it was used on the pipeline, is that correct?

A. Yes.

The Court: Ten thousand, six hundred how much?

(Testimony of Thomas K. Downs.)

A. Ten thousand, six hundred sixty-five dollars even.

Q. And then does the agreement, as it indicates, show that they comprise it at one-half the amount of the rental?

A. The agreement shows that, yes.

Q. And now the parts, what amount was stated for the open account for parts?

A. Five thousand, four hundred sixty-five dollars and ninety-seven cents.

Q. Now, what parts does that figure cover? What were those parts used for?

A. For parts used for the maintenance of the three tractors and the power control unit that [367] we rented to Mr. Tope.

Q. Parts furnished during the time the equipment was being used on the clearing job?

A. Yes.

Q. Then, Mr. Sage and Oaks Construction Company, as is evidenced by that settlement agreement, took half the rental that was discussed between them and added it to the parts inventory charged against the equipment for that period of time and settled for that amount; is that correct?

A. That is correct.

Q. And that was in the total amount of what?

A. Ten thousand, seven hundred ninety-eight dollars and forty-seven cents.

Q. Now, as credit manager of Northern Commercial Company, were you the person of that company primarily concerned with collecting on these

(Testimony of Thomas K. Downs.)

rental options to purchase contracts of Stuart E. Tope? A. Yes, I was.

Q. All of those contracts were with Stuart E. Tope as an individual, were they not?

A. They were.

Q. Now, why is it you were not signatory to that— [368] to a settlement with Oaks Construction Company for the rentals?

A. Well, my understanding of the situation was that I was excused from the settlement because Mr. Oaks was indebted to the Northern Commercial in Anchorage in quite a substantial amount of money, and Mr. Sage, as head of the machinery department, did not want any court action to ensue because of this particular arrangement with our tractors in Fairbanks.

Q. Was Mr. Sage generally over all the machinery? A. Yes, he is.

Q. Then he took over the settlement account and you had nothing to do with it?

A. That is right.

Q. Do you know how much Mr. Oaks was indebted to the Northern Commercial Company?

A. No, I don't know.

Q. Do you know approximately?

Mr. Dunn: I object, your Honor, it can't be important.

The Court: No, it is not important here, as to what he may have owed, unless you can connect it up some way with the transaction of the plaintiff. [369]

(Testimony of Thomas K. Downs.)

Mr. Nesbett: I intend to do that, your Honor.

The Court: Very well, if you say you will, why we can disregard it if it isn't connected up.

Q. (By Mr. Nesbett): Do you know approximately how much Mr. Oaks, or rather Oaks Construction Company owed the Northern Commercial Company at that time?

A. I understood from conversations with our Anchorage people that it was somewhere around two hundred thousand dollars.

Q. Well, then, did you just testify that Mr. Sage took over so that the dispute between Northern Commercial Company with Oaks as to what might be due on the Tope work would not interfere then with the main account with Oaks Construction Company; is that correct? A. That is correct.

Q. Were you fairly familiar with Tope's business dealings prior to his going to work on this pipeline clearing work?

A. Not very familiar, no.

Q. Did you—you received the assignments that you mentioned as having been made from Tope to [370] Northern Commercial Company of monies due from Munter, didn't you? A. Yes.

Q. And you knew the status of his account, didn't you? A. Of Tope's account?

Q. Yes, and as of June when you were talking with Clasby, your attorney, and Tope, concerning notification of Oaks, you were attempting to work something out that would result in payment to your company, weren't you? A. Yes, I was.

(Testimony of Thomas K. Downs.)

Q. Did you yourself agree with this settlement that Truman Sage entered into here with Oaks Construction Company? A. No, I didn't.

Q. Why didn't you?

A. Because I didn't see why we weren't entitled to all our money.

Q. Did you tell Mr. Sage that?

A. I did.

Q. Then, is it your opinion—your statement that the true nature of the claim against Oaks concerning Tope's work was ignored in favor of the two hundred thousand dollar account that [371] Oaks owed your company in the Anchorage area?

Mr. Dunn: Now, your Honor, I object; he wanted the settlement in and he has got it in; now, he is trying to upset the——

The Court: Well, I think it is immaterial whether the witness agreed with it or not.

Mr. Nesbett: Very well, your Honor.

The Court: Settlement was made and that concludes the matter.

Q. (By Mr. Nesbett): Mr. Downs, what eventually happened to that equipment covered by the rental option to purchase contracts, Exhibit 4?

A. It was all returned to us.

Q. And roughly, over what period of time?

A. I think it—the first tractor was returned to us in February, because it broke down on the job; that was the one that required replacements of the engine, and the other two tractors and the power

(Testimony of Thomas K. Downs.)

control unit were all returned by October 1954, I believe; I am not sure.

Q. Did Mr. Tope ever exercise his option to purchase as to any of that equipment?

A. No. [372]

Q. Did he lose his right to exercise an option to purchase on that equipment?

A. Yes, he did.

Mr. Dunn: This is the type of thing that I warned about at the beginning of the trial; it is immaterial; I move to strike it. This is a suit for monies earned, if not a suit for damages other than that.

The Court: Yes, you are right about that.

Mr. Nesbett: Your Honor, my contention is that Mr. Tope has lost doubly by reason of being unable to collect the time——

The Court: Of course, we are confined by the averments of his complaint here.

Mr. Nesbett: I didn't understand that, because generally it has been conceded up here that the judge would try the case strictly on the issues as they found them after the case unfolded itself.

The Court: Well now, if that is true, where no objection is made to the testimony, the Court will try it upon the issues as made by the evidence, not by the pleadings, but where counsel exercises the [373] right to limit the testimony to the pleadings, why then the Court is bound by the pleadings. And I understand counsel has made objection on the grounds that it is beyond the pleadings in the

(Testimony of Thomas K. Downs.)

case. Now, if the testimony should go beyond the pleadings, then it is the right of the parties to amend the pleadings, in order to conform to the proof.

Mr. Nesbett: I have no other questions, your Honor.

The Court: Any cross-examination?

Mr. Dunn: Yes, please.

Cross-Examination

By Mr. Dunn:

Q. Mr. Downs, you confuse me a bit, in connection with these monies that were paid. Did you testify on direct examination that it is your understanding that five thousand of the ten thousand odd dollars was paid?

A. I did testify to that.

Q. You mean—is that what somebody told you?

A. That is what somebody told me.

Q. Do you know whether or not the ten thousand dollars was paid? A. No, I don't.

Q. And so as far as you are concerned, the full [374] monies may have been paid or they may not have been? A. That's possible.

Q. May I have 7 and 8, please?

Mr. Downs, I read in part from Plaintiff's Exhibit 7: "Please note the last item on this statement is a charge for four thousand dollars for a used replacement engine for one of the rented tractors. The original engine was damaged beyond repair by the contractor while on the job." And then

(Testimony of Thomas K. Downs.)

it goes on—remember how it goes on, I assume, don't you? Now, what contract are you referring to?

A. Well, Mr. Stuart Tope.

Q. You are referring to Mr. Tope?

A. Yes.

Q. Do you know whether or not Stuart Tope ever got full credit for this ten thousand odd dollars that was negotiated in the course of this settlement, evidenced, I believe, by Plaintiff's Exhibit 9?

A. No, I don't.

Q. You do not? A. I do not.

Q. Now, I am asking you, you understand, whether [375] you know if he got full settlement, full credit for that settlement, not whether or not it was paid?

The Court: He says he don't know.

A. I didn't understand your question, would you ask me again?

Q. Do you know whether or not Stuart Tope got full credit for ten thousand dollars, ten thousand odd dollar figure, set forth in the settlement? Now, by full credit I mean according to the records of the N. C. Company, was Stuart Tope indebted some ten thousand dollars less after this settlement than before? A. Yes.

Q. So he did get full credit according to the N. C. Company? A. Yes, he would.

Q. Irrespective of whether or not it was paid?

A. Right.

Q. Let me see 9 and 4, please.

(Testimony of Thomas K. Downs.)

The Clerk: I believe 9 is over there. (Indicating the witness stand.)

Q. Mr. Downs, do you know whether or not these rental purchase agreements, Plaintiff's Exhibit 4, are all the same; are they the same [376] form, do you know? A. I don't know for sure.

Q. And——

The Court: Didn't you examine those at some time to see if they were all the same? Can't you examine those during the adjournment to find out if they are all the same. He says he doesn't know.

Q. Yes, I just wondered if he will still be on the stand; that was the only thing, if I can recall him for that point?

The Court: No, no, it would be better to examine him now and examine them. If there is anything you can ask him, he says he doesn't know whether they're all the same; you can examine him on what he does know.

Q. Do you recall Mr. Nesbett questioning you with respect to the waiver of payment during the months of November and April?

A. I recall him asking me that.

Q. Now, I call your attention to Plaintiff's Exhibits 4-3, 4-4, and 4-5, and ask you, first, if those are not concerned with the three cats that Mr. Tope got from the Northern Commercial Company? [377]

A. Yes.

Q. Now, I also ask you if in each of those there is not some provision for waiver of rental payment?

A. There is a statement here and it says that

(Testimony of Thomas K. Downs.)

on the assumption that the property will not be used during the months of November, 1953, through April, 1954, rental payments will be passed during these months and become due and payable again on June 1, 1954, and the first day of each and every——

Q. Now, that is from November of '53 to May of '54, was it? A. April of '54.

Q. Now, it is only for those months, is it not?

A. That's right.

Q. Now, is it waived or merely held in abeyance?

A. It is waived on the assumption that the property will not be used.

Q. Is it waived or held in abeyance; doesn't that say it will become due in June?

A. It is intended to mean waived, while the property was not being used; it was intended that no rental would be charged.

Q. That is your understanding of it, the agreement? [378]

A. That is the understanding of the agreement.

Q. Well, is that what the agreement said?

A. That is what I interpreted it to state.

The Court: That is what it says.

Mr. Dunn: It will speak for itself, your Honor.

The Court: Yes, I understand this equipment was used during those months.

Q. (By Mr. Dunn): Well, I take it a default did occur under each of those agreements, did it not? A. Yes.

Q. Was any payment made on those agreements

(Testimony of Thomas K. Downs.)

prior to November of 1953? A. Yes.

Q. Were they current in November of 1953?

A. I couldn't say that. I don't know.

Q. Have—do you have your records with you?

A. I don't believe I have the records with me, no. I wasn't asked to bring them down.

Q. Now, this settlement agreement, Mr. Downs, in the course of that, N. C. Company was to receive payment for the full open account of Mr. Tope, isn't that right? A. Yes, that's right. [379]

Q. Do you know over what period of time that account covered, Mr. Downs?

A. Not precisely.

Q. When did it begin?

A. I would say it began about the middle of December or the first of January and ran until——

Q. Of what year?

A. 1953, and ran until the date stated in the agreement.

Q. About the middle of December, 1953?

A. Or the first of January, 1954.

Q. And ran through June 15, is that correct?

A. If that is what it says in the agreement.

Q. Well, how do you know that this open account is for only items used on the pipeline job?

A. Because I don't believe Mr. Tope was engaged in any other enterprise at the time; and they were for caterpillar parts, which we knew from numbers of the parts, were going into the tractors, to the same model we had rented, and inasmuch as

(Testimony of Thomas K. Downs.)

he had no tractors at that time, we logically assumed it was for those tractors.

Q. It is an assumption then, isn't it?

A. Certainly, unless you see the part actually go into the machine, you don't know. [380]

Q. Well, actually during that period of time, from mid-December of '53 through June 15 of '54, how many times did you see Mr. Tope?

A. Several times, I don't recall how many.

Q. But you weren't with him the bulk of that time, were you, by any chance? A. No.

Q. Do you really know what he was doing all of that time?

A. I thought I knew; I assumed I knew.

Q. Because of what he told you?

A. Not only what he told me, but what we understood from our own service men and——

Q. What other people told you, then?

A. That is right.

Q. Now, after this settlement was made, Mr. Downs, did Mr. Tope, according to the Northern Commercial Company's books, still owe the balance of the money on which the settlement was based?

A. Yes.

Q. Well—which is more accurate, then, was this a settlement of Oaks' account or was it a payment by Oaks so that N. C. Company wouldn't move against this particular job or the bonds [381] on it?

A. I don't understand your question.

Q. Well, after the settlement, the balance of the

(Testimony of Thomas K. Downs.)

monies, you testified, didn't you, were still owed by Tope? A. Yes.

Q. Then was this settlement, can this settlement rightly be termed a settlement of Mr. Tope's account or is it more aptly termed a payment by Oaks, or an agreement made by Oaks to induce the N. C. Company not to make any claim against this pipeline job?

A. I couldn't say that; I didn't make the settlement.

Q. But at any rate, Tope still owes the balance of the money? A. That is right.

Q. Now, about this meeting that you testified about, to be held in Fairbanks, in July or August of 1954, you spoke of that meeting being set up, did you not? A. Yes.

Q. What do mean by its being set up; I don't understand?

A. An agreement was made, or an arrangement was made as to a specific time and place with the [382] Oaks Construction Company and Mr. Stuart Tope, and they were both notified and we understood that they both understood that they were supposed to be, and agreed to be, at the place and time agreed upon.

Q. Who notified these people to that effect?

A. I don't recall that.

Q. How do you know they agreed to it?

A. Because Mr. Hancock showed up the day before and mentioned the fact that he wasn't going,

(Testimony of Thomas K. Downs.)

they weren't going to show up for the meeting, or he indicated that in his conversation.

Q. But you don't know who notified them?

A. No, I don't know who notified them.

Q. The only reason you know that it was set up was because Hancock came up there a day early?

A. No, that was not the only reason, because Mr. Hancock, as I just stated, alluded to the fact that he understood the meeting was to be held the next day, but they weren't interested in meeting with Mr. Tope.

Q. He said further that they didn't see that they had to talk to Mr. Tope about anything, is that right? A. Words to that effect. [383]

Q. Now, Mr. Downs, is it not true, that due to the representation of Tope, you believed as late as April 15, 1954, that Mr. Tope was working under a contract on this pipeline job?

A. Would you repeat that question, please?

Q. Will you read the question back to him, please?

(The reporter read the last question.)

A. Yes, I understood it was under the contract, yes.

Q. That was due to his representation, was it not? As a matter of fact, he even assigned the contract to you, hadn't he? A. He had.

Q. And wasn't it due to his representation?

A. Mr. Tope's; I don't understand what you mean?

(Testimony of Thomas K. Downs.)

Q. Didn't you believe that Tope was working on this job under a contract, because of what Tope told you?

A. Not only because of what Tope told me, but because of the contract he showed me.

Q. I see, Well, did Tope refute or deny that he was working on the job under a contract?

A. I don't recall.

Q. Quite the contrary, your recollection is, is it not?

A. No, well, no, I couldn't recall that either; I [384] couldn't and wouldn't say one way or the other.

Q. But he showed you the contract?

A. Before the job started, he did.

Q. And as late as April 16, 1954, you thought he was working under a contract on this job, did you not? A. Yes, I could say that.

Q. As a matter of fact, did you not—maybe this is already in—did you not on April 16, 1954, send this letter to Oaks Construction Company?

A. Yes, I wrote the letter.

Q. Demanding payment under the contract of Stuart Construction Company?

A. Demanding payment under the assignment of the contract.

Q. Yes.

Mr. Nesbett: I have no objection to it being admitted, Your Honor.

Mr. Dunn: I offer it, please.

The Clerk: Defendant's Exhibit K.

(Testimony of Thomas K. Downs.)

Mr. Dunn: I would like to read it, please.

The Court: Very well.

Mr. Dunn: It is addressed to Oaks Construction Company, Box 1452, Anchorage. [385]

“Fairbanks, Alaska,
April 16, 1954,

“Attention: Mr. C. E. Oaks,

“Gentlemen:

“According to assignment by Stuart Construction Company, Inc., to us, accepted by you December 2, 1953, all gross earnings by Stuart Construction Company, Inc., in connection with pipeline clearing, are to be paid to us.

“Demand is hereby made upon you for payment at once in accordance with assignment for all gross earnings by Stuart Construction Company, Inc.

“Your prompt co-operation in this matter will be appreciated.”

“Sincerely yours,

“NORTHERN COMMERCIAL
CO.

“T. K. DOWNS,

“Credit Manager.

“TKD:s

“cc: CDF

Tope.” [386]

Q. (By Mr. Dunn): Now, Mr. Downs, did you get a reply to that letter? A. Yes, I did.

(Testimony of Thomas K. Downs.)

Q. Do you remember what they told you, what Oaks said?

A. Yes, I think so, in substance anyway.

Q. What is it, as best you recall?

A. As best I recall, they took issue with me over the word "gross."

Q. Did they say anything about not owing any money, that as a matter of fact, there was a substantial over-payment on that contract?

A. I don't know as they said anything about an over-payment; they said the Stuart Construction Company owed them some money.

Q. Said, "they owed them some money?"

A. Yes.

Q. How many times have you been down here to Anchorage, Mr. Downs, as a result of this lawsuit?

A. Twice previously.

Q. Twice previously? A. Yes.

Q. So this is you third trip?

A. Yes. [387]

Q. Who has been bearing the expenses of those trips, Mr. Downs?

A. Mr. Tope.

Q. Mr. Tope himself? A. Yes.

Q. Has he actually paid for them?

A. I don't understand what you mean by "paid for them."

Q. Well, the way you buy your lunch, do you pay for it? Has Mr. Tope actually paid for your three trips here to Anchorage?

A. Yes.

Q. Now, the first one, did he pay for it when you made it?

(Testimony of Thomas K. Downs.)

A. I don't get—I don't understand what you mean.

Q. Isn't it true that on your first trip you drew money from N. C. Company and charged Tope's account for it?

Mr. Nesbett: I'll object, your Honor, on the ground it is completely irrelevant.

The Court: Well, he had a right to ask the witness the question bearing on his credibility, that is——

Mr. Dunn: I don't doubt Mr. Downs' credibility, your Honor; I don't want to give [388] that impression.

The Court: Well, he is interested in the case then, and that always affects credibility.

Mr. Dunn: Well, that is true.

Q. (By Mr. Dunn): Isn't it true, that the first trip, you withdrew, rightly, with full authority, monies from the N. C. Company, paid your own way down here and charged Mr. Tope's account?

A. That is correct.

Q. That is correct, isn't it? A. Yes.

Q. Now, is it not also true that one of the things that encouraged you to extend credit to Tope was the contract he had on this pipeline?

A. Well, yes, that was the main encouragement.

Q. And——

A. That and the assignment.

Q. And you saw the contract, you said too, didn't you?

(Testimony of Thomas K. Downs.)

A. Yes, I saw a contract which he showed me as being the one he was about to engage in.

Q. Well now, if Mr. Tope made a contract in the name of Stuart Construction Company and assigned [389] it to you to get credit, and then turned around and did the work as an individual, would you consider that a break of faith?

A. Why, I never thought about it one way or the other.

Q. Would you, instead of doing it in the name of the contracting party, the corporation, to do it as an individual, think he had pulled a trick like that on you?

A. I don't know; I never thought about it.

Q. Well, do you think he would do that?

A. I don't understand what your question is.

Q. Do you think Mr. Tope would make a contract on behalf of a corporation that he controlled and assign the proceeds of it to you and then turn around and do the work as an individual and not as a corporation?

A. I don't think so.

Q. You don't think he would do that?

A. I don't think so.

Q. Would that affect his credit standing with you, if he did it?

A. I don't know what particular purpose he would have in mind; that would make quite a difference as to our view of the credit risk. [390]

Q. Is Northern Commercial still extending credit to Mr. Tope?

A. Yes.

Q. Do you recall when rental was last charged

(Testimony of Thomas K. Downs.)

for these three cats? A. I don't recall, no.

Q. Do you have the deposition files there, the second one of Mr. Downs, please. (Handed to him by the Clerk.) Mr. Downs, I hand you this instrument and ask you if that is your deposition given in this matter on July 29, 1958?

A. Yes, it appears to be.

The Court: July 29, did you say?

Q. Yes, of this year. Now, Mr. Downs, did you receive a subpoena for the taking of that deposition? A. Yes, I did.

Q. And according to the subpoena, where was the deposition to be taken?

A. In the law offices of Robert Parrish of Fairbanks.

Q. And where do you live?

A. In Fairbanks.

Q. Wouldn't it have been more—where was it actually taken? A. In Anchorage. [391]

Q. Wouldn't it have been more convenient for you to have had it taken in Fairbanks?

A. As far as time goes, yes.

Q. Oh, why did you come down here?

A. Because I contacted Tope and told him I had been served with a subpoena and I got a call later from Mr. Nesbett asking for the deposition to be taken down here.

Q. And you complied with that request?

A. Yes.

The Court: Is there any defect in the notice in the place where it was taken?

(Testimony of Thomas K. Downs.)

Mr. Dunn: No, sir, this is merely to, again, show the witness' willingness to cooperate with this plaintiff; that is the only point.

Q. (By Mr. Dunn): Now, I invite your attention, Mr. Downs, to page 20 of your deposition, particularly to line 8, and ask you whether or not at the time this deposition of July 29, 1958, was taken, in answer to the question which now follows: "Then I will repeat my question, when was the last rent—last date rental was charged for the equipment set forth in Exhibit 4?" [392] And you answered, "There is a notation on one invoice to the effect that Tractor Serial No. 1H8977 was returned on November 18, 1954, with the angle dozer still to come. There is a notation on another invoice to the effect that Tractor Serial No. 1H9172 was returned to Fairbanks on February 17, 1955. The last date rental was charged on the third tractor, Serial No. 1H9091, was February 27, 1954." Did you so testify?

A. I did.

Q. Now, at that time did you have the necessary records available to you? A. Yes, I did.

Q. Do you believe that testimony is accurate then? A. Yes.

Q. No further questions.

The Court: Any further redirect?

Mr. Nesbett: Your Honor, a question or two.

(Testimony of Thomas K. Downs.)

Redirect Examination

By Mr. Nesbett:

Q. When you testified, Mr. Downs, that you were induced or even encouraged to extend credit to Mr. Tope, because of the contract, what type of [393] merchandise, or for what type of credit were you speaking of when you said you were willing to extend him credit based on the contract?

A. I was referring to the tractor rentals.

Q. Now, those tractors, those caterpillars were sold to Mr. Tope, weren't they, according to Exhibit G, during June, July and August of 1953?

A. About that time.

Q. Well then, when you mentioned the assignments, were you referring to the assignments for income from Munter Construction Company?

A. Yes, I was referring to those and also later assignments of Oaks Construction Company in December.

Q. Well, now, as a matter of fact, when you received the assignment which is in evidence as Exhibit D, dated December 2, 1953, did you think there was a contract in existence at that time?

A. A contract between whom?

Q. Stuart Construction Company and Oaks.

A. Yes, I did.

Q. Did you know that that contract—when did you see that contract?

A. Oh, sometime in December; early—the first

(Testimony of Thomas K. Downs.)

few [394] days of December; I don't remember which date.

Q. If I told you that that contract, according to the copy that we have in evidence, apparently was not signed until December 17, 1953, would you still feel that you had seen a copy of the contract when the assignment was executed on December 2, of 1953?

A. Yes, I am sure I would have seen it.

Q. Did you discuss the contract with Tope? The fact that he might get a contract with Oaks for the clearance work?

A. I don't recall ever discussing the contract with him before I actually saw it.

Q. Did you see a copy of the contract?

A. Yes.

Q. Now, he had already purchased his caterpillars?

A. Yes, he had.

Q. He had—you had already been paid by virtue of two other assignments, approximately \$8500.00 rental, hadn't you?

A. Yes, we had.

Q. Then you weren't encouraged to extend him credit in connection with the rental option to purchase agreements, because of any pipeline contracts in the offing, were you? [395]

A. No. I don't quite understand what you mean.

Mr. Dunn: Your Honor, the witness has already answered that.

The Court: I thought he had; if you want to clarify it, why you have a right to do it.

(Testimony of Thomas K. Downs.)

Q. (By Mr. Nesbett): Now, your deposition has been taken twice in this case, has it not?

A. Yes, that is right.

Q. You have made all the records of the Northern Commercial Company pertaining to this Oaks-Stuart Construction Company, Stuart E. Tope matter available to Mr. Dunn?

A. I gave him everything that he asked for.

Q. Now, on this occasion when you were subpoenaed for a deposition in Fairbanks and the deposition was later taken in my office, was it because I called you in Fairbanks and asked you if you would come down instead?

A. Well, yes, that was why I came down.

Q. Did I tell you why I didn't want to come to Fairbanks for the deposition?

A. Yes, you did.

Q. What did I give as a reason? [396]

A. You said you had a case coming up the following day for which you had laid the groundwork apparently sometime before, and you couldn't come up to Fairbanks and get back to Anchorage before my deposition was heard.

Mr. Dunn: Your Honor, I even stipulated to the change of places; I was merely trying to——

The Court: Yes, when we get into these things where there is no issue, it takes up a lot of time and we get nowhere. When it was over, I understand this deposition was taken and agreeable to everybody, and, of course, counsel said he wanted to show it in order to show the co-operative attitude of the witness; in view of that testimony,

(Testimony of Thomas K. Downs.)

Mr. Nesbett has a right to explain the circumstances under which he came.

Mr. Nesbett: I have no further questions, Your Honor.

The Court: Is that all now with this witness?

Mr. Dunn: Yes, sir.

The Court: Call the next witness.

Mr. Nesbett: May this witness be [397] excused to return to Fairbanks?

The Court: What do you say, Mr. Dunn?

Mr. Dunn: Your Honor—Mr. Downs, when would you want to leave, if you—

Mr. Downs: I would like to leave today if I could.

Mr. Dunn: Leave today?

Mr. Downs: If I could.

The Court: He has been quite thoroughly combed, I wonder what else you would want from him. However, that is for you to say, not for me.

Mr. Dunn: I think it will be all right.

The Court: He wants to know if he may be excused from further attendance in court, and counsel says it is all right, so it is all right with me, Mr. Downs.

Mr. Downs: Thank you, Your Honor.

Mr. Nesbett: On second thought, Your Honor, I will discuss it with Mr. Downs; I was going to say Mr. Oaks has not testified as a witness and it may very well be that I would want to keep Mr. Downs; I'll discuss it with him. [398]

The Court: Yes, that is a matter—

(Testimony of Thomas K. Downs.)

Mr. Dunn: Well, is he excused or not?

The Court: Well, apparently he is not.

Mr. Dunn: He is not, well all right.

The Court: I would have no authority to excuse him unless the parties to both sides say so.

Mr. Dunn: I just wanted to know, because it will probably affect what I do tonight.

The Court: And counsel for the plaintiff says he doesn't know if he is able to excuse him now.

Mr. Nesbett: Mr. Downs says that he will wait, Your Honor, until I can——

The Court: Very well, I will be here.

Mr. Nesbett: Your Honor, I would like to call Mr. Bayless at this time.

The Court: Very well.

(Whereupon, Mr. Downs was excused from the stand.)

JOHN HOWARD BAYLESS

called as a witness for and on behalf of the Plaintiff, and being first duly sworn, testifies as follows on

Direct Examination

By Mr. Nesbett:

Q. Will you state your full name, Mr. Bayless? [399]

A. John Howard Bayless.

Q. Where do you live, Mr. Bayless?

A. Tok Junction, Alaska.

Q. Are you in business there? A. Yes.

(Testimony of John Howard Bayless.)

Q. What is your business?

A. Delivering oil up and down the highway.

Q. How long have you lived in Alaska?

A. Oh, about forty years.

Q. Are you the proprietor of the company known as the Franklin Mining Company?

A. Yes.

Q. And is that company a Standard Oil distributor for the Tok area? A. Yes.

Q. Do you know—you know Mr. Oaks and Mr. Tope, here, do you not? A. Yes.

Q. I'll ask you whether or not you had occasion to furnish fuel to the equipment being used on the Haynes pipeline clearing job in the Tok area, during the months of December, January, February, March, and April, that is, December of '53, and January, February, March, and April and May of '54? [400] A. Yes, I did.

Q. And was Mr., or rather, strike that. Did you furnish fuel for equipment operated in the clearance work from Tok to Big Delta? A. Yes.

Q. And who paid you for the fuel furnished?

A. Mr. Oaks.

Q. And was any arrangement made between you and Mr. Oaks as to who would pay for the fuel used by that machinery in that clearance work?

A. (Pause.)

Q. I will ask you this, did you understand the question?

A. Yes, but it wasn't just as you put it to me; I couldn't answer it the way you——

(Testimony of John Howard Bayless.)

Q. Well, did Mr. Oaks agree that he would pay for the fuel that was used by the equipment operating in that area to clear the pipeline right of way?

A. Mr. Oaks' partner done all the talking.

Q. All right, who was he?

A. Mr. Butcher.

Q. Mr. Owen Butcher? A. Yes.

Q. What did Mr. Butcher say to you in connection with [401] payment for the fuel used?

A. He asked me if I would furnish their subcontractors with fuel, and they would guarantee the oil and fuel bill.

Q. Well——

Mr. Dunn: Same objection to this as I made before; I made objection to Mr. Noonan, previously deceased partner, and Mr. Butcher is dead also.

The Court: Objection will be overruled.

Q. (By Mr. Nesbett): Mr. Bayless, did you—were you paid for all the fuel furnished for the equipment used in that area for clearance?

A. No, not all of it.

Q. And what portion of it were you not paid for?

A. Three thousand and twenty-nine dollars.

Q. And do you know who owned the equipment that consumed that fuel?

A. I suppose Mr. Tope owned the equipment.

Q. Were you living in the Tok area at the time the equipment was working in that area, clearing?

A. Yes.

Q. Was Mr. Tope in the area also?

A. Yes. [402]

(Testimony of John Howard Bayless.)

Q. And was it your understanding that the equipment belonged to Mr. Tope? A. Yes.

Q. And——

Mr. Dunn: Your Honor, I don't like this form of question, once understanding it gives——

The Court: No, on that question there is no question, no doubt here but Mr. Tope owned the equipment and it was subject to the rental rights of this company; now, everybody is agreed on that. Now then, the question was, did he understand that he did own the property; so if it were a matter of proof at the first instance, then your objection would be good, but since there is no question here but that Mr. Tope owned it, owned the property, now then, you ask the witness, in dealing with him if he understood that.

Q. (By Mr. Nesbett): Mr. Bayless, in furnishing fuel for equipment, engaged in the clearing in that area, did you have an occasion to go out on the job to deliver fuel? A. Yes. [403]

Q. And how frequently, for example, would you do that?

A. Well, it didn't happen too often, but one time there when the weather was real cold, the equipment that Mr. Tope had, they couldn't get started on account of the cold weather and he asked us to service the tractors that were sitting along the pipeline; that they wanted to keep them running so when the weather broke, they wouldn't lose a lot of time, and they would be ready to go.

(Testimony of John Howard Bayless.)

Q. Well, generally, how was the fuel delivered for use in the equipment?

A. When they could, they came to the tank farm and picked it up in a truck that had a five hundred gallon tank behind the cab and they hauled it themselves.

Q. Now, did you have an opportunity to observe Mr. Tope's activities in connection with that clearance project? A. Yes.

Q. Were there any other employees, or rather—I will strike that. Did you know a man named Warren Hager? A. Yes. [404]

Q. And do you know who employed him?

A. He was an engineer for Mr. Oaks, I believe.

Q. Was he working on the same area and same job as Mr. Tope? A. Yes.

Q. Now, were your opportunities to observe Mr. Tope's activities in the clearance project sufficient to enable you to state whether or not he had the authority, and acted with the authority that ordinarily goes with a subcontractor?

Mr. Dunn: Objection, your Honor, the witness—there is no proper foundation. The witness should testify as to what he has observed.

The Court: Counsel asked what he did observe, at least, you could bring that out on cross-examination; he says he was familiar with Mr. Tope and some of his activities there. But ask him what he observed, then there will be no objection.

Q. (By Mr. Nesbett): I asked you if you had observed enough to be able to answer that question.

(Testimony of John Howard Bayless.)

Now, I will ask you: Did the Tope—or rather the men engaged [405] in the clearance project live in the Tok Lodge? A. Yes.

Q. Did you have occasion to go there of an evening and on other occasions too, when those men would be there? A. Yes.

Q. And did you have occasion to go out on the clearance project on at least a few occasions?

A. Yes.

Q. Did you know a Mr. Roy Crawford?

A. Yes.

Q. Was he in the Tok area on occasions?

A. Yes.

Q. Was he employed by Mr. Oaks?

A. Yes.

Q. Now, was your observation of those gentlemen and Mr. Tope—I am speaking of Crawford, Hager, and Tope, sufficient to be able to permit you to answer the question: Did Mr. Tope carry on his activities in connection with that clearance project as a subcontractor ordinarily would, with the authority of a subcontractor?

Mr. Dunn: Objection, improper foundation.

The Court: I will leave it for cross-examination; just request what observations he made.

Q. (By Mr. Nesbett): Was Mr. Tope running that clearing job?

Mr. Dunn: Same objection.

The Court: Objection overruled at this time.

Q. (By Mr. Nesbett): You may answer that if you can.

(Testimony of John Howard Bayless.)

A. Seemed to me that Mr. Hager and Mr. Crawford were running the job.

Q. Did you observe what activities Mr. Tope was engaged in, generally?

A. What I saw of Mr. Tope, he was driving a fuel truck and working on the tractors and rustling whatever was needed for the job.

Q. Now, are you familiar with an area of land somewhere near Tok, Alaska, called Cathedral Bluff?

The Court: Called what?

Q. Cathedral Bluff.

The Court: Yes, I remember that.

A. Yes.

Q. Do you recall the pipeline clearance work progressing to and through the area identified as Cathedral [407] Bluff? A. Yes.

Q. Do you yourself know of any difficulties encountered with respect to right of way clearance in that area?

A. Yes, it was hard work and a lot of big boulders and a lot of rock.

Q. Do you know of any difficulties encountered in connection with the right of way clearance because of those facts?

A. Well, it was hard for a tractor to work without being broken down. They wouldn't be able to see these obstacles and they would hit them and break the dozer arms and break—a lot of breakage on account of cold weather and snow, and that is what I would call roughing it.

(Testimony of John Howard Bayless.)

Q. Do you recall, generally, the temperature range in that area during the months of January and February of 1954?

Mr. Dunn: We will stipulate to it, your Honor.

The Court: That it was very cold?

Mr. Dunn: Yes, forty to sixty below; is that all right? [408]

Mr. Nesbett: Sixty-seven on one occasion, will you stipulate to that?

Mr. Dunn: Sure.

Q. (By Mr. Nesbett): Is the metal breakage high when operating in temperatures of that range, Mr. Bayless? A. Yes.

Q. Was it high on that particular clearance project? A. I think very high.

Q. Were you ever present in the Tok Lodge to overhear a conversation between Mr. Tope and Mr. Crawford in connection with moving the entire spread out of Cathedral Bluffs and over to Big Delta, until the weather moderated? A. Yes.

Q. Do you recall approximately when that conversation occurred, that is, with respect to, say the time the clearance work commenced?

A. No, I couldn't give the exact date, but it was during this cold weather when they weren't working that they would be in conference about trying to make more headway and get more done. Then Tope thought if he could move to Big Delta and work back this way, he would be out of the [409] cold; it wasn't as cold down that way and it would be a lot easier going; he could get a lot more done if he

(Testimony of John Howard Bayless.)

could move to Big Delta and work back towards Cathedral.

Q. Did you overhear Mr. Crawford with respect to that suggestion of Mr. Tope's?

A. He just said that it couldn't be done that he had to stay there to finish what he had started.

Q. Did you overhear any conversations between Mr. Hager and Mr. Tope concerning that same subject?

A. No, I don't believe I did.

Q. Now, Mr. Bayless, what was the amount of the fuel bill that you say you were not paid for?

A. I believe it was three thousand and twenty-nine dollars.

Q. You have commenced a lawsuit to try and collect that amount, have you not?

A. I gave it to Mike Stepovich to try and collect, but so far nothing become of it.

Q. Did you contact Oaks or any representative of the Oaks Company, in an attempt to collect that money?

A. I talked to Mr. Oaks a couple of times about it.

Q. Well, that was—that money did represent fuel [410] that went into Tope's equipment, didn't it?

A. Yes.

Q. Well, what did Mr. Oaks say with respect to paying you for that amount?

A. Well, on one occasion, he said that he would pay it but right then that he was—he didn't have the money, but when he did get it that I could get the money.

(Testimony of John Howard Bayless.)

Q. Did you have an occasion to contact him again at another time on the same subject?

A. I just don't remember, but we talked about it at least once or twice; I don't know just how many times.

Q. At that time, when you were contacting Oaks for the payment of that amount, you were a little short of money yourself, weren't you?

A. Yes, I could have used it very nicely.

Q. As a matter of fact, did you threaten to shut off all fuel to Tope's equipment unless you were paid that amount?

A. I did that several times while the job was being done.

Q. In order to get payment? A. Yes.

Q. Well, did you threaten to do it with respect to [411] that amount?

A. Well, it so happened that they kept paying on it but never paid this amount that I had got this check for.

Q. Well, did you get a check for this amount?

A. I—no I didn't. I got a three thousand dollar check from Mr. Tope.

Q. And what were the circumstances under which you got that check?

A. The night that Mr. Tope gave me the check for his oil bill was, I imagine, right around three thousand dollars and I stopped the fuel deliveries until I got paid, and Mr. Crawford said that Mr. Tope had a large estimate for that month and by the time the check would get into Anchorage, the money

(Testimony of John Howard Bayless.)

would be in the bank and so Mr. Tope wrote me a check at the end of that month and I sent it into Anchorage and a week or ten days, or two weeks, it came back "insufficient funds."

Q. Had you contacted Mr. Tope about that check? A. Yes, I had.

Q. And did you contact any one of Oaks Construction Company about it?

A. I called up Mr. Hancock and told him that the [412] check was no good and that I would have to have some money and that is as much credit as I could afford to give them and I would have to be paid before any more oil would be delivered.

Q. Were you paid for the amount represented by that NSF check?

A. No, but they gave me some money; I have forgotten just how that went, but that check was never made good.

Q. And you have never been paid yet for that amount, have you? A. No.

Q. Well——

The Court: That is what he said, that some payments were made on some others later then the three thousand and twenty-nine dollars.

A. It was on the—they continued to get fuel as the job went along.

The Court: But no payment on this debt of three thousand twenty-nine dollars?

A. No.

Q. (By Mr. Nesbett): Did any representative of the Oaks Construction [413] ever contact you

(Testimony of John Howard Bayless.)

with respect to prosecuting Stuart Tope because of that NSF check?

Mr. Dunn: I object, your Honor, they have been—well, I object. It seems to me highly irrelevant here; again, he is attempting to show some damage over and beyond that prayed for.

The Court: Yes, to show the attitude of the defendant at the time toward this indebtedness.

Mr. Nesbett: Yes.

The Court: He says the defendant, through Mr. Crawford, agreed to put the money in—that is the money that was to be paid over to Mr. Tope and he would then be able to take care of the check. Now then, in light of that testimony, I think it would be competent to say what they did after the check was refused, returned “without funds.”

Q. (By Mr. Nesbett): Were you contacted by any representative of Oaks Construction Company concerning prosecuting Mr. Tope for this NSF check?

Mr. Dunn: Same objection, your Honor. This is not a question of the return of an [414] NSF check, it is a question of prosecution.

The Court: That is what counsel asked him.

Q. (By Mr. Nesbett): Were you——

A. Yes.

Q. And who contacted you?

A. Mr. Hancock.

Q. And is Mr. Hancock connected with the Oaks Construction Company? A. Yes.

Q. Where did he contact you?

(Testimony of John Howard Bayless.)

A. At Tok Junction, at our place.

Q. And approximately when?

A. In the evening, and I imagine it was along the first part of February.

Q. Of what year? A. 1954.

Q. And of what month of 1954?

A. It was—I'm not too good on dates, but it was——

Q. Was it after the pipeline clearance was over?

A. No, it was like the job started in December, and it was the following February when——

Q. Does this photostat that I hand you refresh your recollection of any circumstances in [415] connection with that check that you have been telling the Court about? A. Yes.

Q. And what was the date on that check?

A. March 31, 1954.

Q. Is that a true copy of the check you received from Mr. Tope? A. Yes.

Q. Now, does that refresh your recollection to the extent that you can state approximately when you were contacted by Mr. Hancock, with respect to prosecuting Mr. Tope?

A. I would say it was in April; probably the first part of April.

Q. Of 1954? A. Yes.

Q. And did you talk with Mr. Hancock?

A. Yes.

Q. Where did you talk to him?

A. At our home at Tok.

Q. At your home in Tok? A. Yes.

(Testimony of John Howard Bayless.)

Q. Was anyone else present?

A. The wife was there, but she was busy cooking and she didn't pay any attention to what [416] Mr. Hancock and I were talking about.

Q. And what was your conversation with Mr. Hancock concerning that check?

A. Well, he was interested in finding out if Tope had anything and he says, "You're the only one that has anything on him and we would like to find out and if you will exercise this check against him, why we will pay the expenses that is incurred."

Q. Did Mr. Hancock tell you how he suggested you execute this check against him?

A. No, I told him I wasn't interested in that type of business, and that I had made a deal with Mr. Oaks and Mr. Butcher and they guaranteed their subs oil and fuel bill and being that Tope—the money wasn't put in the bank for Mr. Tope and he didn't write the check with the thought of it not being good, why I couldn't see bringing action against him.

Q. Did Mr. Hancock suggest you take the check to the district attorney?

A. No, I don't believe he did.

Q. What manner did he suggest you use the check against Mr. Tope; do you recall any of the details? [417]

A. Well, I take it that he meant to take it to court, or I imagine that is where they do it; he said prosecute him just for writing a "bum" check.

Q. I think that is all.

The Court: You may cross-examine, Mr. Dunn.

(Testimony of John Howard Bayless.)

Cross-Examination

By Mr. Dunn:

Q. Mr. Bayless, over what period of time did you furnish fuel for this job?

A. For the entire time it took to complete it.

Q. Now, when I refer to the job, what do you understand me to refer to?

A. Clearing the right of way on the pipeline.

Q. All of it or only a particular part of it?

A. The section between Tok and Big Delta.

Q. That's the only part that you are talking about?

A. That's right.

Q. I wanted to clarify that; in other words, we are talking only about the section that Stuart Construction Company was clearing, is that right?

A. That's right.

Q. Now, did you carry an account on your books for this fuel that we have been talking about here? [418]

A. Yes.

Q. Do you have a copy of that account with you?

A. No, I don't.

Q. In what name did you carry it?

A. Franklin Mining Company.

Q. Who did you charge it to?

A. Stuart Tope.

Q. Stuart Tope. And you did that throughout the job, is that right?

A. Yes.

Q. Mr. Bayless, is that a true copy of the check that was given you?

A. Yes.

Q. And who is the——

The Court: It is a copy of the original.

(Testimony of John Howard Bayless.)

Mr. Dunn: That is a photostatic copy.

The Court: Very well.

Q. Who is the drawer of that check; who signed it? A. Well——

Q. I'll strike that. Who is the drawer of the check? Do you understand what I mean by that? On what account is that check to be paid? [419]

A. It was to be paid on Stuart Tope's fuel account.

Q. Well, looking at the check, according to the check, who is paying this money?

A. Stuart Construction Company.

Q. Is it?

The Court: N. C. follows that. "N. C. Stuart Construction Company, Inc., is that right?

A. No, it says, "Company" there.

Q. Well, doesn't——

The Court: N. C. follows it there?

A. Oh, yes.

Q. And who signed for Stuart Construction Company? A. Tope signed the check.

Q. Stuart E. Tope. And that is what date, please? A. March 31, 1954.

Q. And you carried this fuel account in the name of Stuart Construction Company? A. Yes.

Q. I don't—I would like to have the original.

The Court: It has already been in evidence.

Mr. Dunn: It hasn't been.

The Court: What I mean is, we know [420] all about it, so you can put it in evidence. I think you might clarify this question as to whether or not these accounts were charged, whether this fuel bill

(Testimony of John Howard Bayless.)

was charged to Tope or Stuart Construction Company.

Mr. Dunn: Well, he just has, has he not.

The Court: Well, he says the check was drawn by the Stuart Construction Company, although Mr. Tope originally drew it.

Mr. Dunn: I know, that is the reason I wanted to clarify that.

The Court: But how was the account kept?

Q. (By Mr. Dunn): Didn't you testify that the account was carried on your book in the name of Stuart Construction Company, Inc.?

A. I believe that is right.

Q. Yes.

The Court: Well, that settles it.

Mr. Dunn: That is Exhibit L, is it?

The Clerk: That is right.

Q. In the winter of 1953, 1954, Mr. Bayless, in that area it is pretty cold, you so testified [421] didn't you? A. Yes.

Q. How about snow, do you have a lot of snow?

A. No, there was a reasonable amount, probably three and a half feet.

Q. On the ground at one time, say you had three and a half feet? A. Yes.

Q. Is it normal to have that much snow in that area when it gets down that cold?

A. Well, no, it don't snow when it is that cold, but it snows when it isn't that cold.

Q. Well now, by three and a half feet—I don't remember, I may have asked you this, I am sorry,

(Testimony of John Howard Bayless.)

I am not sure. Do you mean on the ground at one time or during the winter?

A. During the winter.

Q. About three and one half feet? A. Yes.

Q. You said you brought a suit on the check, didn't you?

A. Yes. I gave the bill to Mike Stepovich, made out to Stuart Construction Company, against the job on the pipeline. [422]

Q. You sued Stuart Construction Company, is that right?

A. I believe that is the way it went.

Q. Now, did you also sue Oaks? Did you sue them both?

A. No, I didn't sue—I didn't sue Mr. Oaks.

Q. If I showed you copies of pleadings in that action, so that—would you be able to recognize them?

The Court: Do you know, are you advised by whom against the suit was brought? Then you just spill that, if it is a fact.

Q. My recollection, your Honor, is that he sued them both.

The Court: He did sue them both.

Q. Yes, Stuart Construction——

The Court: Any objection to that statement by counsel?

Mr. Nesbett: No, your Honor, that is my understanding, the same as the Harlan suit.

The Court: Sued Stuart Construction Company?

(Testimony of John Howard Bayless.)

Mr. Dunn: And Oaks.

The Court: Mr. Oaks or his [423] corporation?

Mr. Dunn: No, he doesn't have a corporation.

The Court: I see, doing business as——

Mr. Dunn: Yes, it is alleged partnership here.

The Court: Anyhow he sued the two?

Mr. Dunn: Beg your pardon?

The Court: I understand it is agreed that both were sued?

Mr. Dunn: Yes.

Q. (By Mr. Dunn): Do you say that Mr. Tope seemed to be running up and down the highway quite a bit?

A. Yes, he was busy on the highway.

Q. Did you see more of him than most anybody else?

A. Yes.

Q. Isn't it a fact, Mr. Bayless, that after this account had accrued, only after it had accrued, only after this indebtedness had built up, then Oaks told you that he would do his best to see that it was paid?

A. Yes. [424]

Q. Now, Mr. Bayless, there seemed to be some confusion in your mind about—well, I don't think it makes any difference. Now, did you testify that Mr. Hancock urged you to sue Mr. Tope, or rather Stuart—it would be Stuart Construction Company, wouldn't it, or Tope?

A. It could be either one or both.

Q. Either one or both? Well, at any rate, did you say that Hancock told you to bring suit so as to find out what the proposed defendant had? By

(Testimony of John Howard Bayless.)

the "proposed defendant," I mean Stuart Construction Company or Tope. A. Yes.

Q. Try to find out what assets they had?

A. Yes.

Q. What money or property? A. Yes.

Q. Did he tell you why he was interested in that? A. No, he did not.

Q. But that is what he was interested in?

A. Yes.

Q. Finding out what assets Tope or Stuart Construction had? A. Yes. [425]

Mr. Dunn: I have no further questions.

The Court: Any redirect?

Mr. Nesbett: Yes, your Honor, I have a question.

Redirect Examination

By Mr. Nesbett:

Q. Did you say that it was only after the account had built up that Mr. Oaks told you he would do his best to see that it was paid?

A. Well, it was some time afterwards that Mr. Oaks and I met at Copper Center and talked about it, about the account; that job was over with then.

Q. You were originally furnishing the fuel, was that based on Mr. Butcher's assurance that he would guarantee payment?

A. Yes, because I didn't know any of these subs and it was through their acquaintance that I would extend the credit.

Q. I have no other questions.

(Testimony of John Howard Bayless.)

Recross-Examination

By Mr. Dunn:

Q. You say, you didn't know any of these other subs?

A. Not before the job was started; I knew none of them.

Q. Well, did you also testify that during the progress of the work you became rather conversant [426] with Tope's activities on this job? And that you learned quite a bit about what Tope was doing on that job? A. Yes.

Q. You did learn quite a bit about him?

A. Yes.

Mr. Dunn: No further questions.

The Court: Is that all now?

Mr. Nesbett: Yes, your Honor.

The Court: Any other witnesses?

Mr. Nesbett: I have one other witness.

The Court: Very well. We better suspend this case until tomorrow morning at ten o'clock.

Gentlemen, how much longer will this case take?

Mr. Dunn: Well——

The Court: Will you have rebuttal?

Mr. Dunn: Yes, Sir, and then I have got a case to present.

The Court: Yes, oh, yes, you have; I have forgotten how many days; this is the end—one more witness and you rest, Mr. Nesbett. How much time will it take for you to try your case, Mr. Dunn, for the defendant? [427]

(Testimony of John Howard Bayless.)

The Court: The way it has been going it will be next summer, but then you can make an estimate.

Mr. Dunn: Well, it is not going to be past August 20, and that I'll guarantee you, your Honor.

The Court: The issue is a very simple one here and you have covered everything else, but the case, most of the time.

Mr. Dunn: Well, your Honor, my feeling now is—Mr. Nesbett has one witness and I have several in rebuttal, and also I will use those witnesses to prove my counterclaim.

The Court: Of course, you would have no rebuttal; the plaintiff may have some rebuttal testimony. On your counterclaim you would, yes; you would have rebuttal on your counterclaim.

Mr. Dunn: I don't see how in the world we are going to be through before the end of the week.

The Court: Very well. We will suspend until ten o'clock tomorrow morning.

(The Court then recessed until Thursday, August 14, 1958, at ten o'clock a.m.) [428]

The Court: Are the parties ready to proceed with the case on trial?

Mr. Nesbett: Yes, your Honor.

The Court: Very well. I believe you have a witness. At least you had one more witness. You may have one that you would want to return to the witness stand.

Mr. Nesbett: Your Honor, I have. This witness, Mr. Harlan, I will call him at this time, and your

(Testimony of Arthur J. Harlan.)

Honor, I do have another witness that I am looking forward to subpoenaing, but he would be a very short witness, and——

The Court: It is all right, whatever the length of time if it is an important witness.

Mr. Nesbett: Call Mr. Harlan.

ARTHUR J. HARLAN,

being first duly sworn upon oath, deposes as follows:

The Court: As I say, Mr. Nesbett, you are not bound by the suggestion that you have only one witness because you have the right to put on as many witnesses as you think to put on the case.

Direct Examination

By Mr. Nesbett:

Q. Is your name Arthur J. Harlan?

A. That is correct.

Q. Where do you reside, Mr. Harlan?

A. I am living at the Parsons. [430]

Deputy Clerk: Is that H-a-r-l-a-n?

A. Yes.

The Court: Where did you say you resided, Mr. Harlan.

A. At the Parsons Hotel at the present time.

The Court: Here in Anchorage?

A. Here in Anchorage.

Q. Where did you reside—were you residing in Alaska in 1953? A. Yes, I was at Tok Lodge.

Q. How long have you lived in Alaska?

A. Since about '35.

(Testimony of Arthur J. Harlan.)

Q. What is your business?

A. I am a dozer operator and heavy duty mechanic.

Q. Mr. Harlan, I will ask you whether or not you had occasion to discuss employment on the Haines pipeline clearing project?

The Court: Discuss what, Mr. Nesbett?

Mr. Nesbett: Sir.

The Court: Discuss what? I didn't understand.

Mr. Nesbett: Employment with Mr. Tope concerning the Haines pipeline clearing job in 1953.

A. I did.

Q. Where did you discuss employment?

A. At Tok Lodge.

Q. And approximately what month?

A. It was in December, possibly along the 20th. [431]

Q. Were you employed by Mr. Tope as a result of those discussions? A. I was, yes.

Q. Approximately when were you employed?

A. Sometime in December, towards the middle or towards the—maybe a little after the middle of the month.

Q. Would it be the month of December?

A. The month of December.

Q. And—

A. Or the month of January, rather.

Q. The month of January and not the month of December? A. That is correct, yes.

Q. You first discussed it with him, did you, in the month of December?

(Testimony of Arthur J. Harlan.)

A. I first discussed it with him in the month of December.

Q. But you were not employed until——

A. Until January.

Q. Approximately when in January, sir?

A. Well it was possibly around the 20th, 21st, something like that.

Q. What were you employed to do?

A. Dozer operator.

Q. Did you go to work as a dozer operator?

A. Yes, I did.

Q. And how long did you work?

A. Three days. [432]

Q. Did your work terminate at the end of three days? A. That's right.

Q. And will you state the circumstances of the termination?

A. Well, Mr. Crawford came out from Fairbanks and told me that I wasn't on the payroll.

Q. Did Mr. Crawford tell you or give you any reason why you weren't on the payroll?

A. He said that they had a man in Fairbanks or someplace that they had to bring out to put on the dozer, that was, I think, a brother-in-law of one of the pipe pump operators on Conol pipeline, and if they broke a pipeline it would ease things off considerably for the construction company.

Q. Were you—did you receive any pay for those three days of work? A. No, I didn't.

Q. Did you make application for pay for that work?

(Testimony of Arthur J. Harlan.)

A. I turned in time cards for those days.

Q. Now, what did you do after your employment terminated there?

A. I continued to stay at the Lodge.

Q. Now, I will ask you whether or not you were employed at any subsequent time to work on that same clearing job?

A. Yes, I worked a little later.

Q. Who employed you?

A. Mr. Tope asked me to go down and overhaul a cat for him that had broke a piston. [433]

Q. And where was this caterpillar, Mr. Harlan?

A. It was close to Cathedral Bluffs.

Q. And what had happened to the caterpillar and what needed to be done?

A. Well, there had to be a new piston put in; the piston had broke and there had to be a new piston put in, and the cat started up. The head had to be taken off and quite a job in cold weather.

Q. At the time you were employed by Mr. Tope to do that work did you know that you weren't going to be paid for your other three days' work?

A. Well, Mr. Tope told me that he would pay me some way and Mr. Oaks told me to go ahead and do the job.

Q. Mr. who told you? A. Mr. Oaks.

Mr. Dunn: Mr. Oaks or Mr. Tope?

A. Mr. Tope and Mr. Oaks, both.

Q. How long were you employed doing that job?

A. It must have been six or seven days.

(Testimony of Arthur J. Harlan.)

Q. Did you finish the job and put the cat back into operation? A. I did.

Q. Did you turn in time for that work, sir?

A. I turned in time cards.

Q. Were you ever paid for that work?

A. No, I wasn't. [434]

Q. Now, Mr. Harlan, during the three days that you were operating the dozer in that area, just what area of the pipeline right of way with respect to Tok were you working in?

A. Well, it was along by Yerrick Creek.

Q. Would the Yerrick Creek be anywhere near Cathedral Bluffs?

A. About five or six miles up the road in a southeasterly direction from Cathedral Bluffs.

Q. Do you recall generally the temperature range in that area during the month of January and February of 1954?

A. Oh, it was running from 40 to 65 below zero.

Q. During the time you were operating the dozer did you observe that the right of way was covered in any points or areas covered by rocks?

A. Yes. I run into rock and broke the dozer arm.

Q. During the three days you were operating?

A. That's right.

Q. Was that cat put out of operation by reason of that casualty?

A. About three-quarters of the day.

Q. Who repaired the cat?

A. I and Mr. Tope.

Q. And what did you do to repair it, briefly?

(Testimony of Arthur J. Harlan.)

A. Well, he went up and either hired or borrowed a dozer from Lytle and Green that had a camp up by the forty mile roadhouse, and we brought it down and put it on and the cat was back into commission. [435]

Q. When you say you borrowed a dozer, what part of the cat is that?

A. That is what you dig with, the dozer, and dozer arm that goes in front of the cat that you push snow with.

Q. That is an attachment to the cat?

A. That is an attachment to the cat.

Q. Mr. Harlan, during the time you were operating that dozer and repairing the caterpillar, did you have an opportunity to observe whether or not Mr. Tope was the boss of that particular clearing area?

A. Well, I don't know whether he was or not. He was helping get the cats ready to go in the mornings and hauling fuel and was helping repair them, and he helped me on the cat that was down. He helped me what time he had.

Q. Did you know a man named Hager?

A. Yes, I did.

Q. Was he working there at that time?

A. Yes.

Q. What were his duties generally?

A. He seemed to be overseeing the job.

Q. During the time you were operating the cat from whom did you receive instructions as to where you were to run and what you were to do?

A. Well Hager came out and showed us turns

(Testimony of Arthur J. Harlan.)

and pipeline and where the station was, and so on and so forth and told us [436] how to clear the road right of way and what to do with the berm as to tramp it down and so on and so forth.

Q. Did you receive any instructions from Mr. Tope as to where and how you were to operate that cat?

A. No, I don't remember receiving any.

Q. From your observation of the authority situation on that project, would you say that Tope was running that job as far as the clearance was concerned or Hager?

A. Well, I would say that Hager was running the job.

Q. Now, did you have occasion, Mr. Harlan, to do any other work on that particular pipeline clearance project?

The Court: Before you approach that, Mr. Nesbett, would you find out from the witness the date when he fixed that last caterpillar?

Q. Approximately when did you make repairs on that last cat, Mr. Harlan?

A. Along in the first of February. I have the dates but they're in the lawyer's office in Fairbanks, and I don't remember the exact dates but it was somewhere in the first of the month of February.

Q. Were the repairs you made on that cat in the rocky area of Cathedral Bluffs? A. Yes.

Q. Is that where the cat was operating at the time?

(Testimony of Arthur J. Harlan.)

A. Yes, that is where the cat was operating. [437]

Q. Now, I believe I asked you, Mr. Harlan, did you have occasion to do any other work on that pipeline clearance project?

A. Yes, two different times. I worked for——

Q. What was the next occasion after you repaired the cat?

A. Well, the next occasion, I believe, I fixed up a pickup for Mr. Tope and then the next occasion after that, I went to work for Mr. Oaks down on the pipeline skinning cat again.

Q. What were the circumstances of that last employment and where did you work?

A. I worked down towards Big Delta. Don Heck come down one day and asked me if I wanted to go to work and I told him I did and he said, "Well," he says, "I am putting two cats on the pipeline," and he says, "I want my own men on them." I had worked for McLaughlin the year before and he was the superintendent of McLaughlin's, and so I went down to there and piloted a lowboy down, that the cats were on, down to Big Russian River where we unloaded them, I think, and I went to work down there.

Q. Mr. Harlan, who was your boss there on that job?

A. Well, Heck told me to look after the cats and see that they wasn't broke up and then my foreman down there was Slim Allred, Sterling Allred.

Q. Do you know where Mr. Allred is now?

(Testimony of Arthur J. Harlan.)

A. He is out at Dillingham.

Q. Now, at the time you were employed by Mr. Heck to work with [438] these McLaughlin cats, were any instructions given as to whether or not those cats could operate in a rocky area?

A. Yes. He told me very plain, he said that those cats wouldn't go in a rocky area; he said they would go on down by Big Delta.

Mr. Dunn: I object to this. He has already identified Mr. Atkinson, employee of Mr. McLaughlin. It is hearsay. He is not an employee of Oaks. He is quoting a little too much, I think.

The Court: Was it off this job?

Mr. Dunn: It may be in a sense, your Honor. In another way I think Oaks—Tope testified that he hired McLaughlin cats to come down there and Heck was McLaughlin's man.

The Court: There were three caterpillars brought in later on?

Mr. Dunn: Three cats——

The Court: That is about that time?

Mr. Dunn: Yes, sir.

The Court: The objection will be overruled.

Q. He said what with respect to operating them in the rocky area, sir?

A. He said they wouldn't be operated in the rocky area at all. He said too cold weather and there'd be too much breakage.

Q. Did you receive pay for working on those McLaughlin cats? A. Oh, yes. [439]

Q. And by whom were you paid?

(Testimony of Arthur J. Harlan.)

A. I was paid by Mr. Oaks.

Q. Have you ever received any money for any of the other work you have testified to?

A. No, I never have.

Q. Did you commence a lawsuit in an attempt to collect that money? A. I did.

Q. And do you know whom your attorney named as defendants?

A. That was Robert Parrish—I don't know who he named. That was the reason I got him to do it.

Q. Now, have you ever owned caterpillars of your own, Mr. Harlan? A. I have.

Q. Have you ever rented cats? A. Yes.

Q. Can you advise the Court what a reasonable rental rate would be for a D-8 caterpillar in January and February and March of 1954 to operate in the area of that clearance project?

Mr. Dunn: Your Honor, we object to that, merely for the sake of the record. I am satisfied of your ruling; because of it we consider it irrelevant in that we are proceeding under a contract.

The Court: Objection will be overruled. [440]

Q. You may answer the question.

A. I would think the cold weather would be from \$25 to \$45 an hour.

Q. Can you explain your answer, why you have that wide a range.

A. Well, you have so much breakage in cold weather that it would seem fair to me that it is a pretty fair rental to take care of the breakage.

Q. Now, when you gave that estimate, was that

(Testimony of Arthur J. Harlan.)

estimate to include the furnishing of an operator for the cat and all the fuel and general maintenance?

A. I think that would, yes. That is what you usually base those things on.

The Court: Has the witness some notion about what it would be where the fuel is furnished and where an operator is furnished, just where the caterpillar is rented alone?

Q. Mr. Harlan, can you give an estimate based on your experience, as to what a caterpillar could be rented for by a contractor to operate in that area in that kind of weather where the rentor would furnish the operator and fuel and all that?

A. Well there would be a deduction there. I haven't figured it out. It would be easily figured. You get the price of fuel at that time and so on and so forth, but I would say from \$20 to \$35.

Q. If the person renting a cat furnished the driver—furnished [441] the fuel, the rate would be considerably reduced, would it not?

A. It would be reduced some, yes.

Q. Are you able to give any figure from your own knowledge or experience?

A. No, I don't have anything that I would have figured, would be the only way I could come to an answer on that question.

Q. How would you set about figuring it?

A. Figure the price of fuel and hourly wages for the driver and so on and so forth.

Q. Subtract that from the hourly rental figure?

(Testimony of Arthur J. Harlan.)

A. Yes. Your breakage would be the same no matter who was operating the cat.

Mr. Nesbett: That's all, your Honor.

The Court: You may cross-examine.

Cross-Examination

By Mr. Dunn:

Q. What reason, Mr. Harlan, did you say Mr. Crawford gave when he took you off the job the first time you were hired?

A. He said that he had a native by the name of Johnny Westland that was a brother-in-law of one of the operators on the Conol pipeline, operated the pump on the Conol pipeline and that it would ease theirs considerable if they had this Westland on in case they broke the pipeline and lost fuel out of the Conol pipeline. [442]

Q. What is the Conol pipeline? I don't see the connection.

A. The Conol pipeline was right along the right of way of the new pipeline; right of ways crossed occasionally.

Q. How was hiring Westland supposed to help this operation out?

A. I wouldn't understand that.

Q. Mr. Crawford say anything to you about your union status?

A. No, he didn't have any reason to say anything about the union status.

Q. Did he say anything to you about your union status?

A. Not until he hired me, no.

(Testimony of Arthur J. Harlan.)

Q. Then what did he say?

A. He said he had a dispatch for me.

Q. And when was that?

A. That was when I was working on the McLaughlin cats.

Q. Some time later? A. Quite a bit later.

Q. He had no dispatch for you at the time you allege he discharged you, is that true?

A. I wasn't discharged; I was just told I wasn't on the payroll.

Q. Did he have a dispatch from the union for you at that time? A. No, he didn't.

Q. How much snow was there around Cathedral Bluffs at this time?

A. Oh, I would say from 20 to 24 inches.

Q. Did I understand you correctly to the effect that you worked twice on this line before you were hired to run these [443] McLaughlin cats, is that correct?

A. No, I just worked once on the pipeline before that.

Q. And that was your first three days of the cat skinning? A. That is right, yes.

Q. But thereafter——

A. Afterwards I worked on it.

Q. The repair cat? A. To repair the cat.

Q. And that was the only work you did until you went to work regularly on the McLaughlin cats?

A. I done some work on a pickup.

Q. Oh. Is that the only appreciable work prior to the time you went to work on the McLaughlin

(Testimony of Arthur J. Harlan.)

cats? A. That is right, yes.

Q. Now, this cat that you fixed near Yerrick Creek, how long did it take you to fix it?

A. That was near Cathedral Bluffs. That was—it took me about six days I think was what it was on that, either six or seven days.

Q. So the cat was down six or seven days?

A. That is right.

Q. Was Hager around when you went to work for McLaughlin?

A. No. He left and had went down and went to work for, I think, on the Tennessee-Miller end of the spread towards Fairbanks. That is where he told me he was going. [444]

Q. Well, it is true then, is it not, that your opinion as to who bossed this job is based upon operating a cat for about three days and also fixing the cat that needed a piston replaced?

A. No, it isn't. It is based on arguments I heard around Tok Lodge when I was there.

Q. Well, then, it is based upon your fixing the cat and operating the cat for three days and what you heard other people say?

A. No, what I heard Mr. Hager say.

Q. What you heard Mr. Hager say?

A. That's right.

Q. When he was arguing?

A. When he was telling Mr. Tope what to do.

Q. How did Mr. Tope react to that?

A. Well, he argued back with him.

Q. He disputed what Hager said?

(Testimony of Arthur J. Harlan.)

A. Yes. He was trying to get to make a move.

Q. I am not asking you what he was trying to do. I asked you if he disputed what Hager said.

A. That is right.

Q. He had to be to argue with him?

A. Uh huh.

Q. Now, the first two times to repair this cat and to operate the cat for three days, did you not testify that Tope hired you?

A. Yes. Tope told me I could go to work. [445]

Q. Well, now, did you testify too, Mr. Harlan, that it doesn't make any difference who runs the cat as far as breakage is concerned?

A. Well, there is some people that is rougher than others on cats.

Q. Then it does make a difference?

A. It does make a difference.

Q. Now, did you also testify that you would consider a reasonable rental between—to be between \$25.00 and \$45.00 an hour?

A. Yes, I believe so.

Q. Do you believe that those rental figures vary that much throughout the construction business?

A. Well, if I was putting a cat in there, I wouldn't put it under those rocks for less than that.

Q. Please, Mr. Harlan, do you believe throughout the construction trade that those figures vary that much? A. Yes, I do.

Q. Are you—how many years have you had in connection with construction business?

A. Oh, possibly 35.

(Testimony of Arthur J. Harlan.)

Q. Now, do you know what the practice in the construction business is with respect to setting a rate when a cat is going to work on an hourly basis?

A. Yes, I do. [446]

Q. Do they set that rate and then put the cat to work?

A. Ordinarily that's the custom, yes.

Q. That would be the custom, wouldn't it?

A. Yes.

Q. Did Mr. Tope ever leave that pipeline job?

A. Well, he had gone to town after parts once in a while, Fairbanks; then he would haul gas.

Q. I mean, that is not what I mean. I mean, did he ever stop working on that job?

A. Oh, yes. Along, oh, when the job was pretty well finished he talked to me one day; I seen him; he come back; the McLaughlin spread, and told me that he wasn't doing any good there, he might just as well go to town. I don't remember the date.

Q. Did Mr. Tope tell you this: "I am not even on the job. I am going to leave."

A. I believe he did, yes.

Q. At the time your deposition was taken, Mr. Harlan, do you remember whether or not you testified to this effect: You are quoting Tope: "He said, 'I am not on the job even';" "he said, 'I am going to leave,'" and he loaded his stuff up and left." Do you remember so testifying?

Mr. Nesbett: Which page is that, Mr. Dunn?

Mr. Dunn: It is page 13 at the line right down at the bottom. Do you remember so testifying?

(Testimony of Arthur J. Harlan.)

A. Yes, I remember making that statement. [447]

Q. And I take it that is true testimony?

A. That is true testimony.

Q. Mr. Harlan, I hand you this instrument and ask you if it does not have written on it, across its face: "Oaks Construction Company #3211"?

A. That's right.

Q. And what is that instrument I hand you?

A. It is a pay check for \$80.15.

Q. Drawn by whom? Who wrote the check?

A. Carl Oaks. Oaks Construction Company.

Q. And to whom is it payable?

A. Arthur Harlan.

Q. And when is it dated?

A. January 30, '54.

Q. January 30 of '54. Now, I invite your attention to the reverse side of that check and ask you if you recognize any signature on the back of it?

A. I don't think that is my signature.

Q. Do you think that is a——

A. Besides that isn't my name.

Q. That isn't your name?

A. My name is H-a-r-l-a-n.

Q. Is it your writing?

A. I don't think it is.

Q. Some doubt in your mind about it? [448]

A. Uh huh.

Q. You think that—is there—is it just a matter of a doubt or do you know it is not your signature?

(Testimony of Arthur J. Harlan.)

A. Well, I write my name and it could be compared by an expert.

Q. I would think you would be familiar enough with it to recognize your own writing. You spell your name H-a-r-l-a-n, don't you?

A. That's right.

Q. And is not the payee on that check spelled H-a-r-l-a-n-d? A. That is right.

Q. And that signature on the back is H-a-r-l-a-n-d, isn't it? A. Uh huh.

Q. Well do you recognize the handwriting of that signature?

A. It looks like my handwriting.

Q. Pretty similar, isn't it?

A. Very similar, yes.

Q. Now, Mr. Harlan, I hand you another instrument and ask you whether or not it has written across the face of it "Oaks Construction Company #3222"? A. Uh huh. That's right.

Q. And to whom—what is this instrument?

A. That is a check.

Q. And to whom is it payable?

A. Arthur Harlan.

Q. How is Harlan spelled on the face of that check? [449] A. H-a-r-l-a-n-d.

Q. Same as the other one? A. Yes.

Q. And who drew that check, please?

A. Oaks.

Q. Oaks Construction Company?

A. That's right.

Q. Now, I invite your attention to the back of

(Testimony of Arthur J. Harlan.)

the check, and I ask you if you recognize any writing on the back of that check?

A. Yes, it is my signature.

Q. Now, both of those checks are made out to l-a-n-d, but one of them is——

A. No, this is made out to l-a-n—well it is l-a-n-d, yes.

Q. Both of those checks are made out to H-a-r-l-a-n-d? A. Uh huh.

Q. And one is endorsed l-a-n and other l-a-n-d, is that right? A. That's right, yes.

Q. One you know is your signature?

A. One I know is my signature.

Q. And the other one looks quite a bit like it?

A. Uh huh.

The Court: What is the date of that last check?

Mr. Dunn: Beg your pardon. [450]

The Court: What is the date of that last check?

A. This is February 6, '54.

Q. Well, Mr. Harlan—not knowing, I'll strike that. I would like to offer these two checks, please, your Honor. Mr. Harlan, when did you go to work on those McLaughlin cats?

A. I don't remember the exact date.

Q. Approximately, please.

Mr. Nesbett: No objection.

A. I went to work on them when the two cats went down on the lower end of the pipeline clearing but I don't remember the exact date.

Q. I realize you don't remember the exact date, Mr. Harlan; can you tell me approximately when it

(Testimony of Arthur J. Harlan.)

was? Would it be in late February or mid-March or——

A. I think it was sometime in March.

Q. You went to work as a cat skinner, did you not?

A. That is right.

Deputy Clerk: Defendant's Exhibit M.

Q. Well, do you recall, Mr. Harlan, whether or not after you went to work regularly there was any discrepancy in the spelling of your name on the pay checks you received?

A. I don't remember whether there was or not. I think it was spelled right.

Q. Now, I hand you an instrument and ask you if this is not the check of Oaks Construction Company dated March 8, 1954, [451] spelled—numbered 3366?

A. Yes, it is.

Q. And how does your name appear on that?

A. It has got the "d" added here, H-a-r-l-a-n-d.

Q. So apparently there was a definite confusion about your name?

A. I don't know why there should be; they had my social security number and my name and everything.

Q. But apparently there was?

A. Apparently there was, yes.

Mr. Dunn: No further questions, your Honor.

The Court: Is there any further redirect?

Mr. Nesbett: Yes, your Honor, a few questions.

(Testimony of Arthur J. Harlan.)

Redirect Examination

By Mr. Nesbett:

Q. Mr. Harlan, when you were attempting to answer a question there in connection with your observations in the Tok Lodge, you mentioned arguments between Tope and Hager?

A. That's right.

Q. What was the nature of those arguments?

A. Well, whether Tope could go to the Big Delta end of the pipeline and start back or whether he had to work through the rocks at Cathedral Bluffs.

Q. And can you recall what Tope wanted to do?

A. He wanted to move down on the Big Delta end while it was cold weather and work back. [452]

Q. And what did Mr. Hager say to that?

A. He said it couldn't be done; he said he had to work right on through the rocks and wouldn't let him do it.

Q. Now, at the time you were first employed by Mr. Tope, I'll ask you, were you a member of the dozer operators union in good standing?

A. I was a member of 302 Operating Engineers in Fairbanks; that is what they do.

Q. Were you in good standing with that union?

A. That's right.

Q. Now, do you recognize this paper, Mr. Harlan? Have you ever seen it before?

A. That's a file for suit, I guess, against the Stuart Construction Company by me, in Fairbanks.

Q. Did your attorney prepare that paper?

(Testimony of Arthur J. Harlan.)

A. I don't know whether he did or not.

Q. Turn the page and see if you recognize it at all?

A. Yes, that is a suit I brought against Stuart Construction Company.

Q. Did—is that the first time you have actually read the complaint?

A. That is the first time I have actually read the complaint, yes.

Q. If I told you that was suit #A-8989, filed in the District Court of Alaska in the Fourth Division, by Robert Parrish, [453] against Stuart Construction Company and Oaks Construction Company for the sum of \$527.19, would you say that that represented your claim for wages or work done on this pipeline clearing project you have been testifying about for which you were not paid?

Mr. Dunn: I object. I think it is pertinent to establish who he sued but the amount of his claim, I don't think has got anything to do with this.

The Court: Well, tabulation is with relation to the work he did on this job, why then it would be competent. If it is to something else, why it would not be.

Q. Does that represent the amount you claimed for the work done?

A. Yes, the—the work and the jeep Vince Abbott hired from me for the Oaks Construction Company for Slim Allred to use on his share of the pipeline.

Q. Did you rent a jeep to Oaks Construction Company? A. That's right.

(Testimony of Arthur J. Harlan.)

Q. Was it your personal jeep?

A. It belonged to the Tok Lodge and I was buying it. It was my personal jeep.

Q. And how long did Oaks Construction Company rent that jeep from you?

A. They had it about two weeks.

Q. And do you recall if any rental was established? [454]

A. Yes. Abbott told me, oh, \$100 a month was the established rate and I told him okay.

Q. Did you make application for reimbursement at that rate?

A. Yes, I did, and I didn't get any answer from it and then Vince Abbott came through, past the Lodge, and asked me if I got anything from it and I told him I didn't, and he said well he would write out a card on it and take it in, he was going into Anchorage and take it in and see that I got my money.

Q. Did you give your attorney, Mr. Parrish, an accounting of what this \$527 represented when you went to see him?

A. Yes, he has an accounting of it.

Q. Do you remember these two checks that were shown to you that were admitted into evidence as Exhibits M and N. Were they?

Deputy Clerk: That is right, M and N.

Mr. Dunn: Is that the way you marked them?

Deputy Clerk: Yes. 3222 is M.

Mr. Nesbett: Do you remember those two checks? A. No, I don't remember them.

(Testimony of Arthur J. Harlan.)

Mr. Dunn: I was asking the clerk, your Honor, which numbered check is which exhibit. I didn't get that.

Deputy Clerk: 3222 M; check of January 30th was M and the other was N.

Mr. Nesbett: That's all, your Honor.

The Court: Is that all now? [455]

Mr. Dunn: Your Honor, I have a couple of questions; he brought out some new matter here.

Recross-Examination

By Mr. Dunn:

Q. Well is it not true, Mr. Harlan, that in order for a union man to go to work he not only has to be a member in good standing, he has to be dispatched, doesn't he?

A. No. You can go to work and your employer can send in for a dispatch.

Q. But it is the obligation of the man that hires you to send in for that?

A. Not necessarily, no.

Q. But it has to be done, doesn't it?

A. You have to have a dispatch to work on a union job.

Q. Now, with respect to this jeep, what model jeep was it? I assume the make was a Willys, is that right?

A. Yes, Willys jeep, an old Army model; I don't remember how old it was. I don't remember the model of it.

(Testimony of Arthur J. Harlan.)

Q. Well, approximately?

A. I don't remember the year. I said it was probably four or five years old.

Q. Good shape?

A. Fairly good shape, yes. It run, in good shape.

Q. Well, now, did you set the rental on that before you let Oaks take it? [456]

A. Vince Abbott come and told me what the rental would be and that play was out of any convenience to Slim Allred.

Q. Let me put the question this way: Did you agree with Oaks or one of his representatives what that rental would be before they took it?

A. That's right.

Mr. Dunn: No further questions, your Honor.

The Court: Is that all of this witness?

Mr. Nesbett: Yes, your Honor.

The Court: That's all, Mr. Harlan.

(Mr. Harlan left the witness stand.)

Mr. Nesbett: Your Honor, my other witness is not available yet, but I would like at this time to offer into evidence the deposition of Sterling Allred, taken in this case, pursuant to notice, and to publish it.

The Court: Any objection to it?

Mr. Dunn: Your Honor, I can't remember it. If he is going to publish it, I assume he will do so by reading the questions and requesting me to read the answers.

The Court: Well that would be a very good way to present it. However, the question is, is Mr. Allred within the jurisdiction of the Court or out.

Mr. Nesbett: Your Honor, he is——

The Court: However, no objection made to it, even if he was over here on the next block, that is a matter with which [457] I am not concerned.

Mr. Dunn: I don't know where he is. This witness, Mr. Harlan, I believe testified that he was in Dillingham.

Mr. Nesbett: That is the only word I have.

The Court: Well if he is not within the jurisdiction——

Mr. Dunn: Well he is within the jurisdiction if he is in Dillingham.

The Court: Where is Dillingham?

Mr. Nesbett: It is out to the westward here; it is not only in the Territory, it is in the Third Division. It is more than 100 miles from the Court, your Honor.

Mr. Dunn: Well, your Honor, that 100 miles—that is rule 45 and that 100 mile limitation is on the taking of depositions, not appearing as a witness before the trial unless I do not properly recollect that rule.

The Court: I think the statute provides that, refresh my memory, but I think it is 100 miles; you can even go within another state to go 100 miles.

Mr. Nesbett: Rule 26 says if he is not within 100 miles the deposition can be read.

Mr. Dunn: I'd like to have a chance to check the rules.

The Court: Suppose we read the deposition, and if it is not properly taken, I will strike it out.

Mr. Nesbett: Rule 26 does, your Honor, of the Federal Rule. [458]

The Court: I haven't got them here on the bench.

Mr. Dunn: Well, your Honor, it seems to me that it would be better to see——

The Court: I would shorten up the time. We lost so much time in this case. Let the deposition be read while we are here fumbling around getting rules and looking up where he is, why let's read the deposition and then you find out if he is within the jurisdiction of the Court, and he ought to have been subpoenaed, why I'll strike out the deposition. Is it a long deposition?

Mr. Nesbett: No, your Honor.

The Court: Very well.

Mr. Nesbett: And with counsel's permission I will skip the formal portions of it.

The Court: That will be good.

Mr. Nesbett: This deposition was taken, your Honor, at my request, pursuant to notice, with me present and Mr. Dunn present, in my office in Anchorage, Alaska, on the 17th day of July, 1958.

The Court: Where did he say he lives?

Mr. Nesbett: Mr. Allred says he lives in Fairbanks ordinarily. Is that what you asked me?

The Court: Yes, it is.

Mr. Nesbett: And he says in the deposition he doesn't expect to be in this area at all at the time of the trial. [459]

Mr. Dunn: Excuse me. Are you going to read the questions, and do you want me to read the answers?

Mr. Nesbett: I'd prefer to read the question and the answer, your Honor.

The Court: Very well.

Mr. Nesbett (Reading): "Sterling L. Allred, being first duly sworn upon oath by Gara H. Lyon, Notary Public in and for Alaska, testified as follows:

DEPOSITION OF STERLING L. ALLRED

Direct Examination

By Mr. Nesbett:

Q. Your name is Sterling L. Allred?

A. Yes, that's right.

Q. What is your business, Mr. Allred?

A. I work in heavy construction.

Q. How long have you been engaged in that business?

A. Well, all my life.

Q. Let me ask you how long you have been in Alaska?

A. Twenty-two years—I have been in Alaska.

Q. Were you employed by Oaks Construction Company commencing in the month of February, 1954?

A. Yes, I was.

Q. Who employed you?

A. Crawford was the man who hired me. He was a representative for Oaks.

Q. Would that be Roy C. Crawford?

A. Yes. [460]

Q. And where were you employed?

A. Fairbanks.

(Deposition of Sterling L. Allred.)

Q. Do you recall the date you were hired in February, 1954?

A. Gee, I can't—it was the latter part of February was when it was.

Q. In what capacity were you employed by Crawford for Oaks?

A. Equipment foreman.

Q. (By Mr. Dunn): Equipment foreman?

A. Yes.

Q. Did you go to work on that job?

A. Yes.

Q. To what area or what location were you assigned?

A. Well, I first went there—between Halfway House and Big Delta.

Q. Do you know whether or not you were employed to work on an area of the Haines Pipeline which was also being worked on by Stuart Tope?

A. Yes, I heard that after I went to work there but all the payrolls was handled by Oaks.

Q. Were you paid by Oaks Construction Company for the time you worked? A. Yes.

Q. That you worked on the job? A. Yes.

Q. Did you receive any compensation from Stuart Tope? A. None.

Q. Or the Stuart Construction Company?

A. No. [461]

Q. Were you given any instructions by Crawford concerning Tope before you went to report to the scene of activity?

A. No. The only thing he told me was that it

(Deposition of Sterling L. Allred.)

was part of Tope's job that they weren't getting done and they couldn't do it or some darn thing, I guess, so then they employed McLaughlin's cats.

Q. Were you employed to run McLaughlin's cats? A. Yes.

Q. Did you do that? A. Yes.

Q. Did you see Tope when you went to that area of the pipeline clearing job?

A. Not immediately when I first come down there. I seen him in a while but I reported to Vincent Abbott when I went down there.

Q. Do you know by whom Mr. Abbott was employed? A. By Oaks.

Q. Was he employed on the same area of the pipeline clearing job you were to work on?

A. Yes, he was.

Q. Do you know what his job was with Oaks Construction Company?

A. He was the superintendent there. He was my superior.

Q. Do you know his title or do you recall?

A. Superintendent, I think, of Operations.

Q. Of that particular area of the Haines pipeline clearing job? [462]

A. You mean over me?

Q. Yes. A. Yes, he was.

Q. Then did you take your orders from Vincent Abbott?

A. Vincent Abbott and Crawford also come down there—but it wasn't—sometime they didn't contact me for three, four days or a week, you

(Deposition of Sterling L. Allred.)

know. If there was any trouble I would call Dot Lake where Abbott was.

Q. Where did you first commence operations when you went to work there?

A. Well, approximately ten miles north of Halfway House, where the cats was when I went there.

Q. Were you given any instructions as to which direction to work in clearing for the pipeline?

A. Yes.

Q. What direction?

A. To work north to Big Delta.

Q. North to Big Delta? A. Yes, sir.

Q. When you first went on the job did you observe Tope on the scene of operations?

A. Well, yes, within a day or two he stopped by and I talked to him. That was the first time I knew him.

Q. Did you have occasion to see him off and on after that when you were working on this clearing?

A. Yes.

Q. Do you know what Tope was doing in that area himself? [463]

A. Yes, he was mostly running down parts and equipment for his cats up there and he would stop and talk and once or twice he traded pickups to come into Fairbanks to pick up parts.

Q. Did you ever have occasion to use any of Tope's equipment while you were clearing on that job?

A. Down on the south end, and coming together—when they brought the two units together and

(Deposition of Sterling L. Allred.)

when they were in a mile or two of each other I would go from end to end, and Abbott was also there at that time and I was trying to bring them in straight. That was the only time I used Tope's cats—not too many. I had McLaughlin's cats from the north.

Q. Do you know who was operating Tope's cats?

A. Gee, I didn't take care of their time. One of them was young Oaks, Duke Oaks I believe they call him. Who the others was I don't recall. I never had no occasion to handle their time cards so I wouldn't—

Q. Did you handle the time cards for the men on the cats you were responsible for? A. Yes.

Q. To whom did you submit the time cards?

A. To Vince Abbott.

Q. At any time while you were working on that section did you take instructions from Tope as to where you were to work? [464] A. No.

Q. Or what to do? A. No.

Q. From your experience in construction, Mr. Allred, would you say that Mr. Tope was running that area as a self employed contractor would ordinarily handle such an area?

A. No, I wouldn't. If that had been the case then I would have took my orders from him.

Q. Did you have occasion to use any of his pickups or trucks there? A. Yes.

Q. What did you use?

A. A pickup and also a station wagon he had there. At various times we had various equipment.

(Deposition of Sterling L. Allred.)

He drove one of Oaks' pickups for a while, and well, whatever the necessity amounted to, I guess. They would come and trade with me which was all right with me.

Q. At that time did you observe a man named Hager to be on the same job? A. Yes.

Q. Do you know what his function was?

A. He was working as an engineer. Whether he was chief engineer or not, I don't know. He was not the engineer stationed there on the job. His name was Bill something.

Q. Was Hager stationed on the same section of the pipeline clearing job you were on or do you know? [465]

A. No, I don't think so. I think he had a larger area clear to the Canadian border. He would drive up and down all the time.

Q. Had you been on that particular job prior to reporting to Vincent Abbott in late February, 1954?

A. No, I never had.

Q. Would it be true to state you were not familiar with what had gone on before you arrived?

A. No, I wouldn't be because my first contact was when I went down there and Crawford called me up one morning and hired me and told me my duties and I went down there. I went to Halfway House and reported to Vince Abbott.

Q. Would you say from your observations and experience there that Vincent Abbott was the immediate officer or official in charge of that clearing there? A. Yes, I would.

(Deposition of Sterling L. Allred.)

Q. Was he giving the orders?

A. He was giving the orders.

Q. How long did you work on that job?

A. Well, it was sometime in April but what the date was I couldn't swear to that.

Q. Had the clearing on that particular section been completed when you left?

A. The two units had met and we completed it.

Q. At the time you reported for work on that area of the [466] pipeline clearing job do you know of any difficulties that were being encountered by cats belonging to Tope in the area where Vincent Abbott was?

A. I heard they were in rocks and were having breakdowns. There was so much normal breakage on the dozers going up there but that they couldn't see in the snow—what was under it.

Q. Do you recall what the weather temperatures were at that time?

A. Fairly close, yes. They ranged from—well, from zero to 35 to 40 below while I was down there—maybe 45. I do know it was pretty crumpy—cold—there for a while.

Q. Where had you been employed prior to going on this job?

A. Directly prior to that I had been working for M-K.

Q. Where were you employed and what were your duties on that job?

A. I was equipment foreman at Eielson.

Q. How long were you on that job?

(Deposition of Sterling L. Allred.)

A. On that job. Oh, about four months, I guess, three or four months.

Q. How long had you been with M-K?

A. Oh, off and on. That particular time just about four months, I guess. I came down from Barrow and went to work for them.

Q. How long were you employed in Barrow? You mean Point Barrow? [467]

A. Yes.

Q. What were your duties there?

A. Heavy equipment foreman.

Q. How long were you in that area?

A. I first went up there in '46. I had been up there about seven years, I guess.

Q. I will ask you whether or not at the time you were employed by Mr. Crawford you were instructed that—to the effect that you were working for Oaks under Vincent Abbott and that Tope had no jurisdiction over you whatsoever?

A. That's right.

Q. (By Mr. Dunn): I object as leading."

Mr. Dunn: I make the same objection.

The Court: It was leading.

Mr. Nesbett: Yes, sir.

"Q. I will phrase it like this. What, if anything, did Roy Crawford tell you with respect to Tope and his jurisdiction over the area you were to work on?

Q. (By Mr. Dunn): Same objection."

Mr. Dunn: I make it again.

The Court: I think he should answer that.

Mr. Nesbett (Reading):

"A. The only thing—my instructions when they

(Deposition of Sterling L. Allred.)

hired me was to report to Vincent Abbott and they said Tope had had a contract but they didn't think that he could finish and [468] that 'Tope has nothing to do with you.' 'Go down there and work for Vincent Abbott.' They also said to 'Wait here until this afternoon' sometime as 'We have to get a pickup and send it down there and you can take it with you' which I didn't do and I drove my own car down there that same night.

Mr. Nesbett: That's all."

Mr. Nesbett: Mr. Dunn maybe wants to read the cross-examination?

Mr. Dunn: I would rather you read it.

Mr. Nesbett (Reading):

"Cross-Examination

By Mr. Dunn:

Q. What is your address, Mr. Allred?

A. 812 - 8th in Fairbanks.

Q. Do you have a phone there?

A. Yes—4616.

Q. You are a resident of Fairbanks?

A. Yes.

Q. How old are you, please? A. 47.

Q. Did you tell us on direct examination that you worked for Oaks on the pipeline job from late February, 1954, until sometime in April of the same year?"

The Court: Now did I understand from that that he worked from February to April?

(Deposition of Sterling L. Allred.)

Mr. Nesbett: Well I read it just as it reads here, your Honor. [469]

The Court: Very well.

Mr. Nesbett (Continued reading):

“A. Yes.

Q. That is correct? That is what you said?

A. I didn't say, no, but it would be because I didn't remain down there.

Q. Why did you leave the job, Mr. Allred?

A. I left the job to go back to work for M-K—to my previous job.

Q. Did you have any difficulty that occasioned your leaving? A. None.

Q. Did you get along all right with Oaks?

A. Yes.

Q. With Crawford? A. Yes.

Q. With Abbott? A. Yes.

Q. Did you get along all right with Hager?

A. Yes.

Q. Did you or did you not testify on direct examination that your position was that of equipment foreman? A. Yes.

Q. What does an equipment foreman do?

A. Well, it would be a ground foreman. You are over the caterpillars and the tractors.

Q. You would be over them, you mean? You direct their work? A. Yes.

Q. Now, as equipment foreman over what caterpillars did you have control? [470]

A. I had control over the rental cats. Some that were rented from McLaughlin.

(Deposition of Sterling L. Allred.)

Q. Now, did you testify on direct examination that the area over which you worked was that between the Halfway House and Big Delta?

A. Primarily it was but we didn't stop there. We turned around and went back.

Q. Will you define that area or areas over which you worked, please?

A. When we completed the area from Halfway House to Big Delta, then we brought the cats back and went on to meet Tope's cats coming from the south.

Q. What were these cats over which you had control doing?

A. Clearing—clearing for the pipeline.

Q. Clearing right-of-way? A. Yes.

Q. After you finished this area between Halfway House and Big Delta and moved so as to work toward Tope, how much uncleared land was there, to the best of your recollection, between you and Tope?

A. Well, they were just by Dot Lake and we took the end at Halfway House and went back to them. That was my assignment. We tied in about five miles north of Dot Lake. That was where the two units met.

Q. Then you began—is this correct—then you began moving south toward Tope from Halfway House? [471]

A. No, no. We began moving north toward Big Delta.

Q. Let me rephrase it. Everything I am asking

(Deposition of Sterling L. Allred.)

now relates to the time subsequent to the work between Halfway House and Big Delta. After you finished that do I understand that you started at Halfway House and worked toward Tope?

A. Yes.

Q. What direction? A. South.

Q. Where was Tope when you began?

A. At Dot Lake.

Q. What direction was he working?

A. He was working north.

Q. What was the distance between Dot Lake and Halfway House?

A. That would take some—I would say the mileage is about 25 or 30 miles. I don't make that as a correct answer because I don't really know. I don't recall the station numbers.

Q. But it is your best recollection it is 25 to 30 miles, approximately?

A. Yes, approximately.

Q. When did you begin working toward Tope? About how long before you left the job?

A. About two or three weeks before I left the job.

Q. After you met Tope, is that when you left and went to work for Morrison-Knudsen?

A. That's right. [472]

Q. What is the distance, as best you recall it, Mr. Allred, between Halfway House and Big Delta?

A. Well, let's see—I would say between forty and fifty miles.

Q. What was the most northern point of the

(Deposition of Sterling L. Allred.)

work allotted to Tope? A. Big Delta.

Q. Big Delta?

A. Yes, and one time there was plans to go on up to the Tanana River but they changed that when we got there and turned us around.

Q. From the period of late February until sometime in April, 1954, now, the time you were on this job, how often did you see Tope? How many times?

A. Sometimes two or three times a week he would come by there and sometimes every day.

Q. What do you think that would average out?

A. Well, I would say it would average out at least four times a week, that is, to talk to. He always stopped when he came by if he saw me—if I was out on the road and I generally was.

Q. So you saw him about four times a week to talk to? A. Yes.

Q. About how long would you spend with him?

A. Oh, sometimes we would just exchange a greeting and [473] sometimes if I had some trouble, such as needing repair parts I would tell him and he would take a message on them.

Q. Then they were brief conversations?

A. Yes, they were brief conversations.

Q. Would you say they were ten minutes long or shorter?

A. I would say ten or fifteen minutes was about average, until we got to Dot Lake and then Tope and I would have coffee. I used to go up there to eat and we would have lunch together.

Q. Well, now, did you include those coffee breaks

(Deposition of Sterling L. Allred.)

and lunch meetings with Tope in your estimate of meetings four or five times a week? A. No.

Q. Now, does the job of equipment foreman, Mr. Allred, require pretty much your full time in the immediate vicinity of the cats that you control?

A. Yes.

Q. You have to keep in touch with them?

A. You have to keep in touch with them and especially on a job like that because you've got them strung out. A man could get hurt with a falling tree or have a breakdown and you have to get him help if he needs help.

Q. You are an experienced foreman?

A. Yes.

Q. Am I then correct in assuming that when you were on this job, in your working hours, your time was spent with your [474] cats?

A. Yes, they were. You have a lot of bird dogging to do there and sometimes you have to run down parts yourself.

Q. Did Crawford or anyone else in Oaks' employ tell you that you were to boss Tope?

A. Boss Tope?

Q. Yes. A. No.

Q. Did you have any jurisdiction over Tope at all?

A. No, I didn't but I was told I would take my orders from Vince Abbott is all.

Q. I understand that. Now, did you testify on direct examination that you were an equipment

(Deposition of Sterling L. Allred.)

foreman at Pt. Barrow, Alaska, for about seven years? A. Yes.

Q. Were you working for M-K there?

A. No.

Q. Who were you working for then?

A. Two—in fact two different outfits, Arctic Contractors, when I went up there in 1946 on oil exploration.

Q. What were you doing for them?

A. The same.

Q. Clearing right of way?

A. No, no, moving freight.

Q. And who else did you work for at Barrow?

A. Puget Sound Drake and also Drake Puget Sound.

Q. What type of work were you doing as equipment foreman? [475]

A. Building runways and also moving freight.

Q. (By Mr. Dunn): I see. No further questions.

Redirect Examination

By Mr. Nesbett:

Q. Mr. Allred, do you know whether or not any instructions were given with respect to using the McLaughlin cats in the area of Dot Lake?

A. I heard that at one time when I first went down there—that they were not supposed to be put up on the rocks and when we got back at Halfway House I asked that question myself because we

(Deposition of Sterling L. Allred.)

were getting into them and they said there was no difference, that Mr. Abbott just put them in there.

Q. By the time you worked up into the area had the 'snow melted any?

A. Yes, it went down an awful lot, but we didn't get very much of the rocks.

Q. (By Mr. Nesbett): No further questions. One more thing.

Q. What are your plans for the next month, Mr. Allred?

A. They are not definite. I think I will be sent up at Bethel but that is a supposition. If I can, I am going back to Fairbanks and go out on the Clear job. That is my plan but the best laid plans do not always work out and a construction man goes where it is.

Q. If we do not contact you——

(A short discussion was held off the record.)" [476]

The Court: The rest is not important, concerning the signature of the deposition.

Mr. Dunn: That is right.

Mr. Nesbett: I offer that in evidence, of course subject to checking the rule if—and if your Honor wants to withhold the ruling on it.

The Court: Well, no. I am going to, upon his testimony, it shows he lives at Fairbanks. Now Fairbanks is a long distance from here and you would have a right to take his deposition and more—

over he understood that there was sort of an agreement that it might be read in evidence. My only inquiry was that if he is in Anchorage and here why of course it would be proper to call him.

Mr. Dunn: Your Honor, I am going to have to comment for the sake of the record to the effect that there is no agreement that it would be——

The Court: Very well. There is no agreement then. We'll understand that.

Mr. Nesbett: That would be Exhibit——

Deputy Clerk: 10.

Mr. Dunn: 10?

Deputy Clerk: 10.

Mr. Nesbett: Your Honor—I took the deposition of Mr. William Olday a long time ago and Mr. Olday resides in Anchorage, and I was depending upon him to be available when I [477] called him here as a witness. I have a subpoena out for him. I have not been able to locate him. I expect to have him by the time I had published this deposition. He is not here. From Mr. Dunn's stand on the deposition of Allred, I assume that he wouldn't agree that we could use the deposition of Olday. Is that correct?

Mr. Dunn: Well, Mr. Nesbett, I don't care too much about Mr. Allred's deposition really. I was trying to merely inform the Court as to our rules here and see what he wanted. But Mr. Olday, before I made any statement on that I'd want to review that deposition. I believe I would want Mr. Olday on the stand, if he is available.

Mr. Nesbett: Well, I have a subpoena out for

him and I fully expect to have him here, and if it would be agreed that I could put him on, it would be a short testimony out of order, and we could go ahead with the case that——

The Court: That is you mean that you would rest with the understanding that you might be able to put him on the stand if you can get him?

Mr. Nesbett: When I can find him, yes, sir.

The Court: What do you say, Mr. Dunn?

Mr. Dunn: I don't see how it is going to do any harm. It might even help.

The Court: I don't either, so would you be willing to go on with your case then, and if he comes, why put him on. [478] That gives you then every opportunity that you might want. Very well. Court stands recessed for five minutes.

(The Court recessed at 11:30 a.m.; reconvened at 11:35 a.m.)

The Court: Gentlemen, are you ready to proceed?

Mr. Nesbett: Yes, sir. Your Honor, Mr. Harlan stopped me in the hall during the recess and says he remembers something about those two checks. I wonder if I could put him on?

The Court: Of course those two check are wholly unimportant here, whether it was l-a-n or l-a-n-d. It is wholly unimportant. However you may put him on if he is here. I assume that he was paid or otherwise he would be making a claim.

Mr. Nesbett: Well he has filed that suit.

The Court: Is that—Are these checks included in that suit, the amount of them?

Mr. Nesbett: No. He will tell you, your Honor, what he thinks those checks are for. I wanted—I didn't want the Court to be left with the impression unless it was the truth that he had been paid for this time that he said he hadn't been paid for.

The Court: Well my judgment was that he had been paid, that he didn't remember. He said he had signed the checks, one of the signatures looked like his signature, so I think that he was paid.

Mr. Dunn: Your Honor, I would like to comment on that.

The Court: Well let's not comment on it. Let's find [479] out what he has.

(Mr. Harlan resumed the witness stand.)

ARTHUR J. HARLAN

Redirect Examination

By Mr. Nesbett:

Q. Mr. Harlan, did you talk to me in the recess? A. I did.

Q. Did you state then you had some recollection of what those two checks that you apparently received were for, Exhibits M and N?

A. I remember what one of them was for.

Q. Which one?

A. The first one that was dated in January.

Q. Would that be Exhibit M, dated January 30th of '54, for \$80.15?

(Testimony of Arthur J. Harlan.)

A. I believe it would. I would know it if I would see the check.

Q. Was that the check in payment for any of the work you did, that you testified you did, for example three days on it as a cat operator or the six days you worked repairing the cat?

A. No. A short time before I worked on it those three days on the cats, why Mr. Tope borrowed a truck that belonged to the Lodge there. It was an International flat bed truck and I went to Valdez looking for some 2" wire cable, I think it was, and that was supposed to be McLaughlin's camp down there and I put in two days. [480]

Q. And is that in your opinion payment for your trip to Valdez and the work you did in connection with the cable?

A. Yes. That is payment on that.

Q. You don't recall what the check in February 6th for \$47.00 was for? A. No, I don't recall.

Mr. Nesbett: That's all, your Honor.

Mr. Dunn: No questions, your Honor.

Mr. Nesbett: Your Honor, could I offer in evidence a telegram addressed to me from Director of Finance at Juneau, concerning the corporation standing of Stuart Construction Company, concerning annual reports?

The Court: What do you say about it?

Mr. Dunn: First I would like to see it first, your Honor. It is true, of course, Mr. Nesbett, that this is in answer to a wire that you sent, is it not?

Mr. Nesbett: It is an answer to a wire and letter, yes, the letter enclosing as a matter of fact the two reports that were not—had been—had not been made, which is conceded.

Mr. Dunn: I don't doubt the fact that this was received from the Department of Finance and of course its contents are obvious to the Court to the effect that these annual reports had been filed but it says they're on today's plane. I would think it—that is the receipt for the filing, I would think they would be the better evidence and they'll be here and then I object to [481] any admission of curing of this defect during the course of the trial or an attempt to cure it.

The Court: Objection is made to that form of proof; I would have to sustain the objection.

Mr. Dunn: Your Honor, I don't object to the form of the proof.

The Court: Don't you?

Mr. Dunn: No, I do not, not to the form, but I object to the offering of any evidence on the ground of relevancy in the light of our Territorial Statute to cure the defect that has already been established.

The Court: If you don't object to the form, then the objection is overruled.

Mr. Nesbett: Mr. Dunn's stand, I believe, is that it doesn't legally effect cure, the effect of legal effects he made in his motion.

Mr. Dunn: That's true.

The Court: Plaintiff's Exhibit 11. What do you call your corporate director over there, Finance?

Mr. Nesbett: **Director of Finance.**

The Court: They supervise the corporate entity?

Mr. Nesbett: Yes.

Mr. Dunn: Well, your Honor, now that that is in I think it is proper to demand a copy of these annual reports so that they may be inspected. [482]

The Court: Well, are they available?

Mr. Nesbett: Yes, your Honor.

The Court: Very well. Are you ready to proceed with your case then I understand—Are they in the court room?

Mr. Nesbett: Does he want the records now, or rather the reports?

Mr. Dunn: If you would, Mr. Nesbett, if you would leave those and attach returns available, with the Clerk, for inspection after we adjourn or recess for noon, I would appreciate it.

The Court: As I understand, Mr. Nesbett, you rest with the right, and you do not object to putting Mr. Olday on if he should appear.

Mr. Dunn: I have no objection.

The Court: Very well.

Mr. Dunn: With him being put on out of order.

The Court: Very well, the plaintiff rests conditionally. Are you ready to go forward?

Mr. Dunn: Yes, sir. My first witness will be Mr. Harris Hancock, your Honor.

The Court: You may call Mr. Hancock.

WILLIAM HARRIS HANCOCK

being first duly sworn upon oath, deposes as follows:

Direct Examination

By Mr. Dunn:

Q. Will you state your name, please? [483]

A. My name is William Harris Hancock.

Q. Where do you live, Mr. Hancock?

A. On the Seward Highway, Mile 9.

Q. Just outside of Anchorage here?

A. That is correct.

Q. Are you familiar with the parties to this action, namely, Stuart Construction Company, Stuart E. Tope, the partnership of Oaks Construction Company and, I believe, it is Williams Brothers, McLaughlin and Marwell are also named?

A. Yes; I am.

Q. Did you ever have any relationship to Oaks Construction Company? A. Yes.

Q. What was that?

A. I was office manager.

Q. During what period, please?

A. From June, 1953, until July of 1955.

Q. Did you do any accounting work in connection with your duties as office manager?

A. I did.

Q. Who kept the accounts of Oaks Construction Company? A. I did.

Q. Were all accounting matters of Oaks Construction Company handled by you or under your supervision?? A. Yes. [484]

Q. Are you acquainted with this Haines pipe-

(Testimony of William Harris Hancock.)

line job and particularly with that section of it, the right of way clearing of which was subcontracted to Stuart Construction Company? A. Yes.

Q. Did you ever have occasion to do any accounting in connection with that particular section of a line in that particular work? A. Yes.

Q. Mr. Hancock, I hand you this instrument and ask you if you can identify the same?

A. Yes; I can.

Q. What is it, please?

A. This is a statement of the account of Oaks Construction Company-Stuart Construction Company on the pipeline clearing work.

Q. Is that a complete accounting?

A. Yes; it is.

Q. And does that show any monies due from one person to another? A. Yes; it does.

Q. What does it show in that respect?

A. It shows that our records indicate \$37,498.64 as being due Oaks Construction Company from Stuart Construction Company.

Q. Did you ever make a similar accounting wherein you showed that amount owing as being \$38,080.82? A. I did. [485]

The Court: What were the figures you give, Mr. Dunn?

Mr. Dunn: It is the figures, your Honor, in paragraph 9 of my counterclaim, \$38,080.82.

Q. Which is correct, the \$38,000 odd figure or the \$37,000 odd dollar figure evidenced by the instrument you have in front of you?

(Testimony of William Harris Hancock.)

A. The \$37,000 figure is correct.

Q. The \$38,000 figure had to be adjusted, I take it? A. That's right.

Q. Now, what items are covered—well, no—strike that question. This is a complete accounting, is it not? A. Yes, sir.

Q. And are there a number of schedules attached? A. Yes.

Q. And what are those schedules?

A. The schedules consist of first one detailing the earnings——

Q. Well, are the schedules merely breaking down into detail the main items set forth on the sheet there? A. That is correct.

Mr. Dunn: Your Honor, I would like to offer that into evidence. I have a copy here for Mr. Nesbett if he'd like it.

Mr. Nesbett: I have no objection, your Honor.

The Court: Very well. Plaintiff's Exhibit O—Defendant's Exhibit O.

Q. I now hand you Defendant's Exhibit O, Mr. Hancock, and [486] invite your attention to the last notation on the first page. Will you read that, please?

A. "Schedule B is gross payroll. The compilation of schedule B is set forth in Schedule A, following Schedule B; Schedule A following Schedule A-1 compiles the net payrolls, monies actually given the men after deductions from the earnings."

Q. Did you request me to make an addendum?

A. I did.

(Testimony of William Harris Hancock.)

Q. Is that addendum correct?

A. Yes, sir.

Q. Now, will you check Exhibit O and see that Schedules A and B and A, prime, are properly identified?

A. Yes; they are.

Q. From what source did you extract the information to compute plaintiff's—excuse me, to compute Defendant's Exhibit O?

A. That's from the books of Oaks Construction Company.

Q. Only the books?

A. All the pertinent records of the company.

Q. Were those records and books that were kept in the ordinary course of business?

A. That is correct.

Q. Now, then, Mr. Hancock, I ask you whether or not you ever had occasion to make a compilation of the operating time of the caterpillar tractors that were used by Stuart Construction Company in the course of its work? [487]

A. Yes; we did.

Q. Now, I hand you this instrument and ask you if you can identify the same?

A. Yes; I can.

Q. What is it?

A. This is a compilation of the hours that the cats worked, taken from the records sent to us from the job.

Q. The records kept in the ordinary course of business?

A. That is correct.

Q. Did those same records also show the num-

(Testimony of William Harris Hancock.)

ber of hours worked by the men who operated those same cats? A. Yes.

Q. Is there any discrepancy between the two?
Any difference between the two?

A. There would certainly be——

Q. Did the cat operators get paid irrespective of whether or not the cat broke down?

A. I presume they did.

Q. According to your records they did?

A. We have more hours paid for cat operators than we have operated hours of the cats by our records.

Q. Now, I ask you whether or not this compilation shows the reason for the breakdown or what was wrong with the cat when it broke down?

A. Yes; it does. [488]

Q. Was that information taken from the same records? A. Yes.

Q. And did you prepare this compilation?

A. It was prepared under my supervision.

Q. Do you know if it is accurate?

A. Yes.

Q. Is it? A. Yes.

Q. Now, I ask you whether or not that compilation was prepared for the—for use in this lawsuit? A. No.

Q. Do you know when it was prepared?

A. Yes.

Mr. Dunn: I would like to offer this compilation, your Honor, when Mr. Nesbett is through with it. Will you bear with me a moment, please?

(Testimony of William Harris Hancock.)

The Court: Yes, sir. Mr. Dunn, unless there is an emergency, could we suspend until 2:00 o'clock?

Mr. Dunn: Yes, sir. I would like to get this marked if I could.

The Court: Very well.

Q. How many cats does that compilation cover?

A. Three.

Q. Those are the three cats that Tope had on the job?

A. Stuart Construction Company had. [489]

Mr. Nesbett: May I ask that it be marked for identification only, your Honor?

The Court: Yes. For the Defendant, it is Defendant's Exhibit P, I believe.

Deputy Clerk: That's right.

The Court: Well, then, gentlemen, I have another matter here and this case will be suspended until 2:00 o'clock this afternoon. [490]

Afternoon Session

The Court: Gentlemen, are you ready to proceed with the case on trial? You had a witness on the stand, Mr. Dunn.

(Mr. Hancock resumed the stand.)

Mr. Dunn: Yes, your Honor.

The Court: The last exhibit was P?

Mr. Dunn: That was for identification, I believe, your Honor.

The Court: P has reference to the time that was used by this equipment, I understood.

(Testimony of William Harris Hancock.)

Q. (By Mr. Dunn): Mr. Hancock, I hand you Defendant's Exhibit O and call your attention to the first page and ask you the following questions: Under that accounting, how much money was earned by Stuart Construction Company?

A. Thirty-three thousand three hundred thirty-five dollars and forty-seven cents.

Q. Now, was any part of that cat rental?

A. Yes.

Q. How much?

A. One thousand one hundred twenty-five dollars.

Q. Now, that's included in the thirty-three thousand and some odd dollars? [491]

The Court: How much rental?

A. One thousand one hundred twenty-five dollars.

Q. What was that rental based on?

A. Based on eighteen dollars an hour, at the time authorized.

Q. Time authorized for what?

A. For extra work.

Q. What do you mean by "extra"?

A. Work that was not included in the price paid for lineal foot of clearing; such work was authorized by Oaks Construction Company supervisory personnel on the job.

Q. Is that beyond the contract?

A. The contract indicated an eighteen-dollar-an-hour would be paid for such work, if and when authorized.

(Testimony of William Harris Hancock.)

Q. This is a contract to December 17, 1953, that you are talking about?

A. I believe that is the date of Stuart Construction Company.

Q. And that cat rental is merely in accordance with the provisions of the contract?

A. That is correct.

Q. Now, I ask you, according to this accounting, how much money was advanced by Oaks Construction [492] Company in total?

A. Seventy thousand, eight hundred thirty-four dollars and eleven cents.

Q. Was that money paid, do you know?

A. Yes.

Q. How much of that seventy thousand dollars, odd dollars, consisted of payroll?

A. Twenty-seven thousand, four hundred thirty-one dollars and ninety-eight cents.

Q. How much of that money advanced by Oaks Construction Company consisted of equipment rentals?

A. Twenty-two thousand, one hundred forty-nine dollars and eighty cents.

Q. Now, do you know to what equipment that refers? A. Yes.

Q. Generally? A. Yes.

Q. What?

A. The largest amount of it was for rental of extra cats.

Q. You mean cats other than those of Stuart Construction Company or Tope?

(Testimony of William Harris Hancock.)

A. That is correct.

Q. Was any part of that seventy thousand odd dollars [493] paid to the Northern Commercial Company? A. Yes.

Q. How much?

A. Approximately ten thousand dollars, well, the figure is ten thousand, seven hundred ninety-eight dollars and forty-seven cents.

Q. That's the exact figure, is it not?

A. That is correct.

Q. Do you know whether or not that was in accordance with the settlement that was negotiated with N. C. Company by Oaks?

A. Yes; it was.

Q. How much of that seventy thousand odd dollars was for meals and lodging?

A. One thousand, four hundred fifty-two dollars and eighty-six cents.

Q. How much of that seventy thousand odd dollars was for fuel oil and gas, oil and things of that nature?

A. Six thousand four hundred eighty-two dollars and twenty-two cents.

Q. And how much of that same seventy thousand odd dollar figure was for miscellaneous repair parts?

A. Two thousand five hundred eighteen [494] dollars and seventy-eight cents.

Q. Now, you testified that that entire sum has been paid by Oaks Construction Company, did you not? A. Yes.

(Testimony of William Harris Hancock.)

Q. Now, do you know whether or not of your own personal knowledge, now, there exists accounts, indebtedness incurred by Stuart Construction Company in connection with this pipeline job, that were not paid by Oaks Construction Company?

A. I do.

Q. Are one or more of those accounts included in this seventy thousand odd dollar figure that you testified Oaks, in fact, has paid?

A. I don't understand your question, Mr. Dunn.

Q. Are any of these unpaid accounts included in this seventy thousand odd dollar figure you are shown on Plaintiff's—Defendant's Exhibit O?

A. No; they are not.

Q. Are you acquainted with a three thousand dollar check given either Mr. Bayless or Franklin Mining Company, in connection with this pipeline job?

A. Yes.

Q. Is that three thousand dollar check [495] included in that seventy thousand odd dollar figure?

A. No.

Q. Now, I hand you this instrument, after showing it first to counsel; Mr. Hancock, I hand you this paper and ask you whether or not you prepared that?

A. Yes; I did.

Q. Is that your handwriting?

A. That is correct.

Q. Now, using that to refresh your memory, do you know, or can you tell the Court of any other accounts of Stuart Construction Company that were incurred in connection with this pipeline job

(Testimony of William Harris Hancock.)

that have not been paid by Oaks, and that are not included in that seventy thousand odd dollar figure?

A. Yes.

Q. Will you do so, please?

A. I have listed here, accounts that were called to the attention of Oaks Construction Company by creditors of Stuart Construction Company, and which I did not take into the obligations of Oaks Construction Company, because they were not recognized by us as being some that we should pay: Miller and Bently Equipment [496] Company in Fairbanks, L & B Company Welding of Anchorage, Yukon Equipment Company in Fairbanks, Northern Commercial Company, Anchorage, Hyke Transfer Service in Copper Center, The Alaska Road Commission, Tok Junction, and Alaska Chemical Company in Fairbanks. And in addition the three thousand dollar check to Franklin Mining, Howard Bayless was holding.

Q. Well, now, Mr. Hancock, are you personally familiar with the pleadings in this action; by that I mean the complaint and the answer and counterclaim and so on? A. I am.

Q. Do you know whether or not Oaks Construction counterclaimed for various damages, based upon an alleged unauthorized pledging by Stuart Construction Company of the Tope—of the credit of Oaks Construction Company and for generally jeopardizing the credit rating of Oaks Construction Company?

(Testimony of William Harris Hancock.)

A. I don't understand your question fully, Mr. Dunn.

Q. Do you know whether or not in a counterclaim in this action, Oaks Construction Company claims damages based on an allegation of Stuart Construction Company or Stuart E. Tope [497] without authorization, pledged a credit of Oaks Construction Company and injured the credit standing of Oaks Construction Company?

A. Yes; I believe that is in the——

Q. Now, I hand you a number of items of correspondence and I caution you not to testify as to the contents of these items of correspondence; I want you to use them merely to—well, first, I ask you whether or not these are papers that were kept in the ordinary course of business of Oaks Construction Company? A. Yes; they are.

Q. Now, I want you to use those papers to refresh your memory, in order to answer this question, and the questions: Do you know of any accounts of Stuart Construction Company for which payment has been made on Oaks Construction Company, of Oaks Construction Company?

A. Your question is not clear to me, Mr. Dunn.

Q. Do you know any creditors of Stuart Construction Company who had demanded payment from Oaks Construction Company for the bills of Stuart Construction Company, incurred in connection with this pipeline job?

A. Who have not been paid, is that the ones you [498] want to know?

(Testimony of William Harris Hancock.)

Q. Well, either paid or unpaid that have not already been mentioned?

A. I am confused by your question; I am sorry, Mr. Dunn.

The Court: The question is, as I understand it, any bills of the plaintiff been propounded against the defendant, against Oaks?

Mr. Dunn: Yes, sir.

Q. (By Mr. Dunn): Do you know of bills of the plaintiff that have been propounded against the defendant? A. Yes.

Q. That have not been mentioned?

A. No; I mentioned those that I am aware of.

Q. All right.

The Court: How much were those accounts? I take it the accounts you read there from the paper were the claims against what you say is plaintiff's, and demand has been made upon your Company?

A. That is right.

The Court: What is the total of those?

A. I have a total here of fifteen thousand, one hundred thirty-four dollars and ninety-one [499] cents.

The Court: Does that include the three thousand and twenty-nine—the check that was drawn?

A. The three thousand figure was what I have used.

The Court: I see.

Mr. Nesbett: That included the Bayless check?

A. That is correct.

(Testimony of William Harris Hancock.)

The Court: He put that in, three thousand dollars, he said.

Q. (By Mr. Dunn): Well, throughout the course of this work, did various creditors of Stuart Construction Company or Stuart E. Tope make demand for payment on Oaks Construction Company? A. Yes.

Q. Can you name any of those creditors that haven't already been mentioned? You may use these papers to refresh your memory.

A. Northern Commercial Company, Tok Lodge, C. A. Bicknell, operating as maintenance service, and also Williams Brothers as prime contractor.

Q. Is that all you can think of?

A. I believe the rest have all been mentioned.

Q. What about the Half-Way House, did they make [500] any demand on you?

A. I don't recall.

Q. May I have Exhibit P, please?

Mr. Nesbett, have you had a chance to examine the copy of Exhibit P that I gave you?

Mr. Nesbett: I examined the addendum to a letter that you said was the same, and I suggested before lunch that I wanted to ask the witness a few questions before this was admitted as an exhibit, Exhibit P into evidence.

Mr. Dunn: Well, I would like to have him proceed on that, if I may, so I can get that in.

The Court: Counsel is right about asking questions on voir dire.

Q. (By Mr. Nesbett): Mr. Hancock, I'll hand

(Testimony of William Harris Hancock.)

you Exhibit P so you will be able to look at it. I believe you said you prepared that, did you not?

A. Yes, or I had it caused to be prepared in my office.

Q. And is that when you were employed by Oaks? A. That is correct.

Q. You aren't with them now, are you?

A. No. [501]

Q. When did you have it prepared?

A. I don't know the exact date.

Q. Approximately?

A. I believe about the middle of April.

Q. Of which year? A. Of 1954.

Q. 1954? A. Yes.

Q. Middle of April? A. Yes.

Q. Did you state in response to a question by Mr. Dunn, what you used as a basis to compile these figures? A. I believe I did.

Q. What did you use?

A. Original records of the job that were supplied to me.

Q. And in what form were those original records?

A. Either in foreman's reports, equipment reports, or time cards.

Q. And would that be foreman's reports, equipment reports or time cards that came down from this particular pipeline job, that is the Tope project? A. Yes. [502]

Q. Were those—were there three different types

(Testimony of William Harris Hancock.)

of reports that you used in order to compile this Exhibit P?

A. No; the time cards were connected—with perforated card with equipment on one section and the operator's time on the other section. The foreman's part summarized the labor element and the equipment part summarized the equipment hours.

Q. And were those cards in Oaks Construction Company's possession at the time you prepared this? A. That is correct.

Q. And they were forwarded to you by the foreman on the job, is that right?

A. That is right.

Q. And would that be Hager or the other foreman that was there?

Q. Whoever we had in a supervisory capacity at the time; it changed.

Q. Do you know where those cards are now?

A. I do not.

Q. Was the time and the equipment all on the same card?

A. It was a perforated card that was [503] later separated for our own use.

Q. Perforated card that was separated, do you mean the time section was separated from the equipment section and so forth?

A. The payroll section was separated from the equipment section.

Q. And was the perforated card perforated by the foreman before it was forwarded to you, or—

A. No.

(Testimony of William Harris Hancock.)

Q. Was it—were the records on those cards written out in figures and handwriting by the foreman?

A. They would normally be written by the operator.

Q. The operator? A. That is correct.

Q. The IBM operator, machine operator, you mean? A. No; the cat operator.

Q. Oh, what part would the cat operator take in—

A. Each employee turned in his time card.

Q. That would be as to the time for that particular employee, sir? A. That is correct.

Q. He would turn that card into the foreman, would he? A. That is right.

Q. And what would the foreman do in the [504] ordinary routine?

A. Once a week he would forward those to our office.

Q. Forward all the employees' cards?

A. That is right.

Q. Time reports? A. Yes.

Q. Now, who turned in the time on the equipment though?

A. The same procedure would follow.

Q. Same procedure; do you mean the cat operator would turn into the foreman, the number of hours the equipment was used? A. Yes.

Q. And then the foreman would do what?

A. He would transmit those to the office manager.

(Testimony of William Harris Hancock.)

Q. The same records that the operator gave him were transmitted down to you?

A. That is right.

Q. And you had all those records when you prepared these figures? A. Yes.

Q. The—looking at Exhibit P, for example, take any given date that shows under the column, “Hours Worked,” a figure and then again another figure under the column entitled, “Hours Down,” do [505] you know, would that indicate figures put on those cards by the cat operators to show how many hours on that day the cat was operated by the operator? A. Yes.

Q. And then the other figure, if there is a figure under the “Hours Down” column, would indicate the cat operator’s report as to the number of hours that cat was out of action on that date, is that correct? A. Yes.

Q. Then, what sort of day was used as a basis in computing the number of hours available for use? For example, how many hours a day were considered as a basis?

A. Without reference to the record, I can’t tell you that. The payroll records speak for themselves on that point.

Q. The payroll records, but Mr.—I am thinking of the equipment record proportion, that is all this purports to show is the hours the equipment was used or the hours it was down. And didn’t you say the sections, perforated sections were torn apart as to the equipment and the man’s time? [506]

(Testimony of William Harris Hancock.)

A. Yes.

Q. Well, then, wouldn't the equipment portion of the card show the hours in operation and the hours out of operation? A. Yes.

Q. And don't you know what number of hours was used as a basis for determining the availability of the equipment, for example, on the job?

A. It would be the normal work day that was in effect at the time we are talking about.

Q. I see. Then, if a normal working day was a nine-hour working day, you would take that nine and divide it between the hours the equipment operated and the number of hours out of nine that it was not operating, correct? A. Yes.

Q. And that would be on the equipment cards?

A. Yes.

Q. And that would be—those figures would have been prepared by the cat operator himself, is that right? A. Yes.

Q. And given to the foreman or superintendent?

A. Yes.

Q. And forwarded down to you? [507]

A. Yes.

Q. And those cards should be in Oaks' file somewhere, should they not?

A. They should be.

Q. When did you leave Oaks Construction Company? A. July of 1955.

Q. And were those cards there at that time?

A. Yes.

Q. Have you—you have had no occasion to look

(Testimony of William Harris Hancock.)

for them since you prepared these figures, is that correct? A. No; that is not correct.

Q. That is not correct?

A. I have looked for them.

Q. Oh, you have looked for them. When did you look for them? A. Yesterday.

Q. I see. Well, were you able to find them?

A. No.

Q. Did you look in all the old correspondence and file cabinets that used to be there when you were working there?

A. That is not possible.

Mr. Nesbett: Well, your Honor, I was hoping, as a matter of fact, those cards [508] could be found; I think they would be the best evidence, because, of course, this is going to be an important point in this case.

The Court: Have you made a computation from the plaintiff's viewpoint, as——

Mr. Nesbett: I have made a rough computation during the noon hour, your Honor, and it puts us quite a ways apart here on the number of hours worked. Of course, Mr. Tope, all he had to go on was Oaks' records as to the men, the hours the men were paid and he has gone at it from that approach. This, of course, creates a wide difference.

The Court: Well, now, do I understand that this figure of eighteen dollars per hour was kept on all that equipment during the whole time, notwithstanding the contract? There was a statement here that some of it was for extra time used by

(Testimony of William Harris Hancock.)

the equipment, not what had been determined in the contract. For instance, the one thousand dollars—I don't know if I can put my finger—oh, yes, he said eleven hundred twenty-five dollars for rental of equipment. Well, however you bring that out [509] I have notes here that there was some rental equipment and the question was, what was that, and it was eighteen dollars for extra time under the contract.

Mr. Nesbett: Well, your Honor, I think that will become clear to you; I can see where it is confusing, but Mr. Hancock has gone ahead and prepared all this based on the fact that there was a contract in existence and all charges against that work are rightfully against Stuart Construction Company.

The Court: Yes; that is what I understood.

Mr. Nesbett: Well, now, that contract provided that if it was required during the clearance that the operator or the contractor move some of the clearance debris farther away from the right of way than he ordinarily would for some particular reason, fire hazard or something else, they then were to get eighteen dollars an hour for cat time, and that is how they come to the figure of eleven hundred and twenty-five dollars, for extra cat time used for those purposes; that is what I have an idea—— [510]

The Court: You might ask him if he understands that?

Mr. Nesbett: Yes, but I didn't think——

(Testimony of William Harris Hancock.)

The Court: He probably did not, because he was an office manager.

Mr. Dunn: Well, I will ask him. That is where that eleven hundred twenty-five came from, isn't it?

A. That is correct,

Mr. Nesbett: I was confined, I thought, your Honor, just to this exhibit and I didn't try to go any further than that, so I object to its being admitted into evidence. I think those cards should be produced. They are important enough to be required because it does create a——

The Court: The witness says he can't do it, so we will have to use this and your computation, too, I think.

Mr. Nesbett: If your Honor please, can I ask him another question or two on that?

The Court: Yes.

Q. (By Mr. Nesbett): Did you give up looking for those cards? [511] A. Yes.

Q. Let's see now, you have been out of that office for how long? A. Since 1955, July.

Q. And has the office moved in the interval?

A. Oaks vacated the premises within a rather short period after that.

Q. Has Mr. Oaks worked with you in looking for those cards?

A. Mr. Oaks suggested where I should look to find them and called in the help of another former employee, who was directly connected with such records, and together we looked for them, unsuccessfully.

(Testimony of William Harris Hancock.)

Q. And where did you look? Where are the records now?

A. I don't know where the records are now; we looked in the Ken Hinchey Company storage buildings, where Mr. Oaks said he had had the records stored at one time.

Q. You didn't have anything to do with moving the records out of the office you worked in, did you?

A. No.

Q. Did Mr. Oaks help you to look for it or [512] just give you suggestions?

A. He gave us suggestions where to look.

Q. Well, at least, your Honor, I think the admission into evidence should be held up until we hear from Mr. Oaks on it. If this is the best there is and it can be substantiated in some fashion, we will certainly have to deal with it.

The Court: Let it be admitted and then it may be modified and the cards may show that it does not truly reflect the time used, that is the time that was used by the cats, that is by the Caterpillars. When I say "time used by them" I mean the time that they were used in this construction work.

Mr. Dunn: You say you want that to reflect that this exhibit does not truly reflect the time?

The Court: Well, according to the plaintiff, I say the plaintiff says it doesn't, I know nothing about it, I am listening to the testimony. It is the time that you have computed that they were used.

Mr. Nesbett: I wouldn't be positive to say it

(Testimony of William Harris Hancock.)

doesn't; I don't know. It is the first time [513] I have ever seen it or Mr. Tope——

The Court: I think it is competent evidence, however, that is the defendant's computation.

The Clerk: Are these admitted?

Mr. Dunn: Yes.

Q. (By Mr. Dunn): At whose request was that search for those time cards made?

A. I believe you asked me to look for them, Mr. Dunn.

Q. And in the course of looking for them, did you find any old moldy records and mushrooms growing out of them and so on? A. Yes.

Q. Can you think of any place else to look for those time cards? A. No.

Q. If you'd do, will you look for them; I would like to see them, too? A. Yes.

Q. Now, calling your attention to Defendant's Exhibit P, I ask you how many hours were worked by each of these three cats? How many hours were worked? [514]

The Court: During the whole period?

Q. Yes, as reflected by this exhibit which is the whole period.

The Court: I believe the cats didn't work, they were just used during that time?

A. We have on one cat, three hundred and forty-nine hours, and we have one hundred ninety-seven hours on another, and one hundred and seventy-seven and one-half hours on the third.

Q. Will you change the marking on that, on

(Testimony of William Harris Hancock.)

Exhibit P, to show it is no longer for identification?

The Clerk: Yes.

Q. Mr. Hancock, did you testify on being questioned by Mr. Nesbett a minute ago that that was prepared about April of 1954? A. Yes.

Q. Was a copy of it ever furnished to Northern Commercial Company? A. Yes.

Q. Do you know when that copy was furnished?

A. Approximately the same date or shortly thereafter.

Q. Now, Mr. Hancock, do you know whether or not the Stuart Construction Company ever [515] requested through your office, in your capacity as office manager, a progress payment? A. Yes.

Q. Now, I hand you Defendant's Exhibit F and ask you if you can identify it?

A. Yes; I can.

Q. What is that?

A. It is a request from—for payment for progress estimate from Stuart Construction Company, signed by Stuart Tope and approved by Roy S. Crawford.

Q. Now, was that delivered to your office in the ordinary course of business? A. Yes.

Q. And it is a request for payment on what basis?

A. On the basis of 11.2 miles of clearing at one hundred per cent completion and two miles at fifty per cent completion, which is equivalent of 64.416 lineal feet.

(Testimony of William Harris Hancock.)

Q. Based on feet then, is it not?

A. That is correct.

Q. And——

The Court: I have somewhere the date of that request; what is the date of it?

Q. February 6, 1954. [516]

The Court: Yes; that is right.

Q. In the course of your duties as office manager for Oaks Construction Company, did you ever prepare a statement of account showing the monetary relationship, from time to time, between Oaks Construction Company and Stuart Construction Company? A. Yes.

Q. I hand you this instrument—after Mr. Nesbett has looked at it—and having handed it to you, I will ask you if you can identify it?

A. Yes; I can identify this.

Q. What is it, please?

A. It is a statement of account with Stuart Construction Company as of January 31, 1954, showing earnings and back charges against——

Q. Had you made any prior to that time?

A. No.

Q. That's the first one, then?

A. This is.

The Court: This is January 31 of 1954?

Q. Yes. Well, now, according to your computation, as reflected by that statement of account, who owes who, so to speak? [517]

A. Stuart Construction Company is indebted to

(Testimony of William Harris Hancock.)

Oaks Construction Company in the amount of twenty-five hundred and twenty-five dollars.

Q. Now, that's the first statement of account?

A. Yes.

Q. I would like to offer this, please.

Mr. Nesbett: I have no objection.

Q. (By Mr. Dunn): Do you know whether or not that statement of account ever came to the attention of Stuart Construction Company?

A. I mailed it.

Q. To whom?

A. To Stuart Construction Company.

Q. Now, did you ever have an occasion, Mr. Hancock, to prepare statements of account subsequent to that? A. Yes; I did.

Q. During the—how often did you prepare them? A. Monthly.

Q. Did—was Stuart Construction Company advised of these monthly statements of account?

A. Yes.

Q. How were they advised—how was it advised?

A. They were mailed to them. [518]

Q. Now, did the picture change from month to month? A. Yes.

Q. In what way?

A. The amount of Stuart Construction Company's indebtedness to Oaks increased faster than his earnings.

Q. Well, did the amount ever decrease after the first statement of account that you prepared?

(Testimony of William Harris Hancock.)

A. No.

Q. On the contrary, did it increase every month? A. Yes.

Q. Now, the—I again hand you Defendant's O, and ask you whether or not the first page of that reflects the final statement of account.

A. Yes; it does.

Q. Did these statements of account bear any relation to each other?

A. Yes; the estimates and the back charges were compiled on accumulated basis so that the last estimate is an accumulation of all the previous ones.

Q. Terminating in Exhibit O, then?

A. Yes; correct. [519]

Q. In the summer of 1954, did you have a conversation with a Mr. Bayless, concerning a three thousand dollar NSF check? A. Yes.

Q. Did he advise of any particular antagonism towards Oaks Construction Company?

A. No.

Q. Against——

The Court: '54?

Q. '54.

May I have Exhibit 2, please? Mr. Hancock, I hand you Plaintiff's Exhibit 2 and ask you to examine it, if you will, please, until you feel that you are more or less familiar with it?

A. I have examined it.

Q. Can you tell what it is?

A. Yes; this is a schedule of costs of operation of Stuart Construction Company on their three

(Testimony of William Harris Hancock.)

cats, for work on the Oaks Construction Company contract during the year of 1954.

Q. Have you had appreciable experience in accounting-bookkeeping? A. Yes.

Q. For how many years? [520]

A. Eight years.

Q. Now, examining that statement, can you tell—here, let me, I am getting ahead of myself, excuse me, strike that. Has that been eight continuous years? A. Yes.

Q. From examining that exhibit that you now have in your hand, can you tell on what that computation is based? A. Yes.

Q. What is it based on?

A. It appears to be based on the payroll.

Q. Well, are you familiar with the practice in construction business with respect to paying cat operators or cat skimmers when their cat breaks down? A. Yes.

Q. What is the practice?

A. They're paid whether the machine can work or not.

Q. Well, then, does that exhibit, Plaintiff's Exhibit 2, tell you anything at all about the true costs of operating these cats?

A. I don't believe it does; I believe it is merely an estimate. [521]

Q. Now, inviting your attention to the same exhibit, again, I ask you if any allowance is made to that exhibit as a cost for parts?

A. No; there is not.

(Testimony of William Harris Hancock.)

Q. Did I misread it? (Checking with the witness.)

A. You are correct; I overlooked the last item on the sheet, which shows a provision for costs.

Q. I will repeat my question. Does Plaintiff's Exhibit 2 make any allowance for the expenses of repair parts? A. Yes.

Q. Does it say where those repair parts came from? A. Yes.

Q. Where?

A. Northern Commercial Company, Fairbanks, Alaska.

Q. How much of an allowance is made?

A. Three thousand two hundred thirty-two dollars and ninety-eight cents.

Q. Now, Mr. Hancock, I hand you Plaintiff's Exhibit 9, which purports to be a settlement between the Northern Commercial and Oaks, and ask you what amount of money, in accordance with the terms of that settlement, was paid N. C. Company for its parts for Stuart [522] Construction Company?

A. There is an open account item shown here of five thousand four hundred and sixty-five dollars and ninety-seven cents, which I presume to be parts.

Q. Where do you work, now, Mr. Hancock?

A. For Bashaw Equipment Company.

Q. Do you have any connection with Mr. Oaks, whatsoever? A. No.

Q. You don't work for him any more?

(Testimony of William Harris Hancock.)

A. No.

Q. Have you worked for him since you left Oaks Construction Company? A. No.

Q. And that was back in 1955? A. Yes.

Q. How long have you been connected directly or indirectly with the contracting business?

A. Since 1949.

Q. Well, during that period of time, have you formed any opinion as to the frequency or practice, whatever you want to call it, of a contractor carrying the payroll of a subcontractor? [523]

A. Yes.

Q. Do you know how often it is done?

A. It is done occasionally.

Q. Is there anything surprising about it?

A. No.

Q. Have you ever seen it before?

A. Yes.

Q. Now, as office manager for Oaks Construction Company, were you concerned with only the section being cleared by Stuart Construction Company? A. No.

Q. What other parts were you concerned with?

A. The entire clearing in Alaska.

Q. How much—how many parts were there in Alaska? A. Three.

Q. Were they about the same size?

A. Approximately.

Q. Who had the other two?

A. Schmidt and McMahan, and Mr. John C. Miller; Schmidt and McMahan worked together.

(Testimony of William Harris Hancock.)

Q. So Schmidt and McMahan had a section, and Stuart Construction Company had a section, and Miller had a section? A. Yes.

Q. Do you know whether or not Oaks carried the payroll [524] of Schmidt-McMahan?

A. Yes.

Q. Did he carry the payroll of Miller?

A. Yes.

Q. Did McMahan draw a—have a drawing account or like a salary; was he on a salary?

A. Yes.

Q. How about Miller?

A. I believe he did, too.

Q. Well, when you charged Stuart Construction Company for the various items set forth in Defendant's Exhibit O, did you advise Stuart Construction Company of these charges?

A. Yes.

Q. How did you advise him?

A. We mailed copies of the invoices to him.

Q. When?

A. In the case of payrolls, weekly, and in case of other charges, as they came up.

Q. How did you advise them of payrolls?

A. We made out an invoice and attached a copy of the computations of the payroll for his men.

Q. May I have B, please? Now, I hand you Defendant's B and ask you whether or not that is the type of invoice you furnished. [525] Stuart Construction Company for each payroll?

A. Yes; it is.

(Testimony of William Harris Hancock.)

Q. Do you notice that long piece of paper——

A. Yes.

Q. ——attached there? A. Yes; I do.

Q. What is that?

A. That is the actual—a copy of the actual computations of the payroll and deductions as for each of the men, for which Stuart Tope was billed.

Q. It is a carbon copy?

A. That is correct.

Q. A carbon copy of the original, and one of those was mailed to Stuart Construction Company every week? A. That is right.

Q. How about these invoices, how often were they sent?

A. Just as the charges appeared they were mailed and the invoices mailed.

Q. Did Stuart Construction Company ever make—I will put my question like this; strike it, please. Did Stuart Construction Company or Stuart E. Tope ever make any complaint, [526] whatsoever, through your office with respect to any invoice or payroll statement mailed to it?

A. No.

Q. None whatsoever?

A. None whatsoever.

Q. Did your office have any correspondence with Stuart Construction Company concerning a bond?

A. Yes.

Q. Do you personally know of that correspondence? A. Yes.

Q. What was it; what was the nature of it?

(Testimony of William Harris Hancock.)

A. It was requesting him to comply with the terms of his subcontract for Stuart Construction Company and supply a bond.

Q. Do you have any idea how many such requests were made?

A. I think three in writing.

Q. Over what period of time, as you best remember? A. Two months.

Q. And what two months would that be?

A. I believe it would be January and February, 1954.

Q. Do you know—correction—did you know an individual by the name of “Butcher”?

A. Is that Owen Y. Butcher? [527]

Q. I only have J. Butcher; I believe it is Owen J. Butcher.

A. I knew an Owen Butcher, yes.

Q. Did he ever have any relationship to Mr. Oaks? A. He was a partner.

Q. In what?

A. Oaks Construction Company.

Q. Where is Mr. Butcher now?

A. Deceased.

Q. Did you ever know a Mr. J. E. Noonan?

A. Yes.

Q. Did he ever bear any relationship to Mr. Oaks? A. Yes; he was a partner.

Q. And where is he? A. Deceased.

Q. Now, Mr. Hancock, it is alleged in the counterclaim of Oaks Construction Company, Paragraph XIII, that, “The defendants have suffered

(Testimony of William Harris Hancock.)

certain damages and losses, the amount of which is currently unknown." That is at the time the counterclaim was prepared, because no final audit of the work of Oaks Construction Company was ever made. Do you know whether or not that audit was ever made, was ever completed?

A. I do not. [528]

Q. You do not yourself; well, in any event, your Honor, we wanted, and I take it Mr. Nesbett will have no objection since it is to the advantage of his client, to amend Paragraph IX to request thirty-seven thousand, four hundred ninety-eight dollars and sixty-four cents?

The Court: Instead of thirty-eight thousand?

Q. Yes.

The Court: I imagine that Mr. Nesbett would agree to that.

Mr. Nesbett: I have no objection, your Honor.

Q. And I can bring it out with another witness, but I don't see the point in it; we are forced to abandon the claim in XIII because that audit was never completed; Oaks ran out of money.

Mr. Nesbett: Which one is that?

Q. Paragraph XIII of the counterclaim damages, in an unknown amount to be determined by the audit when the entire job was finished.

May I have H, please?

Mr. Hancock, I hand you Exhibit H, Defendant's [529] Exhibit H, and ask you whether or not prior to the present time you have had an opportunity to examine that?

A. I have.

(Testimony of William Harris Hancock.)

Q. In whose presence?

A. In the presence of the Bailiff of this Court.

Q. What is it?

A. It purports to be the ledger of Stuart Construction Company, Inc., general ledger.

Q. Did you go all through it? A. Yes.

Q. I direct your attention to the account therein designated, "No. 34," and ask you what information is revealed in that account?

A. No. 34 is entitled, "Oaks Construction Company, Payable."

Q. Now, what does that mean, "Oaks Construction Company, Payable"?

A. It being in the liability group of the ledger——

Q. Is it in the liability group of the ledger?

A. That is correct.

Q. Go ahead, excuse me.

A. Under September 30, 1954, there is an entry, a credit entry, setting up twenty-six thousand, nine hundred and eighty-five dollars [530] and twenty-two cents.

The Court: Will you give that again, Mr. Hancock?

A. Twenty-six thousand nine hundred and eighty-five dollars and twenty-two cents, which is a credit figure in the accounts payable ledger and would represent money owed by Stuart Construction to Oaks Construction.

Q. What date is that, please?

A. September 30, 1954.

(Testimony of William Harris Hancock.)

Q. Mr. Hancock, is that twenty-six thousand odd dollar figure familiar to you for any reason?

A. Yes.

Q. Have you ever seen it before, other than in that book? A. Yes.

Q. Where?

A. On one of the estimates, monthly estimates, an account goes, which I prepared for Oaks Construction Company, showing the amount of indebtedness of Stuart Construction Company to Oaks Construction Company.

Q. Is that one of those that you prepared?

A. Yes. [531]

Q. Which we previously designated as a statement of account? A. Right.

Q. Were you subpoenaed to appear here, Mr. Hancock? A. I was.

Q. I have no further questions, your Honor.

The Court: You may cross-examine. We shall take a short recess at this time.

(Whereupon, a ten-minute recess was had at 3:00 o'clock.)

The Court: Proceed with cross-examination.

Cross-Examination

By Mr. Nesbett:

Q. Mr. Hancock, you were testifying concerning Exhibit H, before recess, will you look through that general ledger of Stuart Construction Company, were you not? A. Yes, sir; I did.

(Testimony of William Harris Hancock.)

Q. And you were testifying from Entry No. 34, weren't you, when you mentioned the accounts payable to Oaks Construction Company?

A. Not Entry 34, Account No. 34.

Q. And that twenty-six thousand odd dollar figure, which was showed as an accounts payable, was the amount Oaks Construction [532] Company was at one time claiming Stuart Construction Company owed them?

A. That is the figure that appeared on one of the estimates which I prepared.

Q. Well, as late as August or September of 1954, after the job was over, your first estimates are a compilation of the accounting, you did have that as a figure that Stuart owed Oaks, is that right?

A. I believe so.

Q. And you made written demand on Tope for that amount?

A. That is right.

Q. Now, did you examine Exhibit H, the journal entries, or examine further in that exhibit, which is the general ledger to determine whether or not the accountant who set that bookkeeping setup, showed it simply as an amount alleged to be, or claimed to be owed by Oaks?

A. Mr. Nesbett, I can't answer your question simply; I examined the journal entries as you asked me, which is one question. What is your next question about?

The Court: Did it appear in the [533] journal or ledger?

Q. Did you determine from an examination then

(Testimony of William Harris Hancock.)

of that exhibit that the amounts claimed to be owed by Oaks were disputed by Stuart?

A. I believe you are confusing several entries.

Q. Can you answer that question or is it too obtuse? A. Would you repeat it?

Q. Can you determine from an examination of that ledger account that the amounts claimed to be owed by Oaks were actually entered by dispute by Stuart?

A. There are some entries in the ledger showing items in question; is that what you mean?

Q. Yes; the amount claimed to be owed by Oaks from Stuart was questioned, was it not?

A. That was not set up in the accounts payable as a questioned account.

Q. Did you examine Exhibit J, prepared by the same accountant that prepared the general ledger?

A. What is Exhibit J?

Q. That is the financial statement prepared by Marlor, the accountant? A. I did. [534]

Q. All of Oaks' claims of indebtedness against Stuart Construction Company were marked with question marks on that account, were they not, or statement?

Mr. Dunn: Your Honor, I think the witness should be given the exhibit.

The Court: Yes; it should be given to him, if it is marked with a question mark, why it is on the exhibit, and the witness, if the witness knows and has examined it and says he recalls it, why then you can ask him about it.

(Testimony of William Harris Hancock.)

Q. (By Mr. Nesbett): I just asked him if he does recall it, your Honor. Do you recall it?

A. I cannot recall the figures on the sheet.

Q. I hand you Exhibit J, Mr. Hancock, and call your attention to an item on the last page of the financial and operating statement, the last item under the listing of "current," an item entitled, "Oaks Construction Company, payable (?) twenty-six thousand nine hundred eighty-five dollars and twenty-two cents"; that would undoubtedly refer to the same twenty-six thousand figure you were testifying to when [535] you read the general ledger, Exhibit H, was it not?

A. That is the same figure which is indicated as questioned in the ledger.

Q. That same figure is indicated in this financial statement as questioned, is it not?

A. It is.

Q. Mr. Hancock, you are not familiar with anything that led up to the signing of that contract of December 17, 1953, are you?

A. In what way, sir?

Q. You weren't in on any of the discussions or negotiations, you simply saw the contract after it had been signed? A. That is correct.

Q. From the time you were given the contract, I assume you ran your accounting office down here in Anchorage as though that contract was still in effect, and made your charges and financial statements accordingly?

Mr. Dunn: I object to that, your Honor, at

(Testimony of William Harris Hancock.)

least it is misleading to me; he spoke of running an accounting office. This witness——

The Court: I suppose that I understand [536] the witness is an accountant?

Mr. Nesbett: He ran Mr. Oaks' accounting office.

A. That is correct.

Mr. Nesbett: Accounting department, I should say.

Q. (By Mr. Nesbett): Then you knew something of the business between Mr. Oaks and the other two contractors, McMahan and Miller, didn't you? A. I did.

Q. Did the contractor, McMahan, on another section of that clearing job, draw an advance each week or month? A. Yes.

Q. Did Mr. McMahan furnish a performance bond? A. Yes.

Q. And did Miller furnish a performance bond? A. Yes.

Q. Do you know—I'll withdraw that question. In your duties as office manager for Mr. Oaks, you didn't have occasion to go out on the jobs themselves, did you? A. Not normally.

Q. Did you say, Mr. Hancock, that in preparing [537] the number of hours each Caterpillar operated, which is shown in Exhibit P, that you did that during the month of April of 1954?

A. That is my best estimate.

Q. And do you know approximately when during the month of April?

(Testimony of William Harris Hancock.)

A. I would assume about the middle of the month.

Q. Then, Exhibit P would not reflect the operations up until May 1, or the time the project was completed, would it?

A. No; it would not.

Q. I didn't hear you.

A. No; it would not, if that date is correct.

Q. Did you have an occasion to draw up this compilation in the middle of April for any reason, other than to satisfy office routine?

A. Yes.

Q. And what was that reason?

A. In connection with correspondence to Northern Commercial Company, when they wanted to know our position regarding the account of Stuart Construction Company.

Q. And did you send that compilation, which is now Exhibit P, to Northern Commercial Company at that time, as an addendum to a letter? [538]

A. I did.

Q. You did? A. That is correct.

Q. And was the letter from Oaks Construction Company to Northern Commercial Company?

A. Yes.

Q. You wrote that letter yourself, didn't you?

A. Quite possible, in fact, I am sure I did.

Q. Do you recall suggesting to Northern Commercial Company in that letter that Northern Commercial Company and Oaks Construction Company

(Testimony of William Harris Hancock.)

join hands in fighting Stuart Construction Company's claims? A. Read that question.

Q. Read the last question, please.

(The last question was read by the Reporter.)

A. That's not a correct statement of what was in my letter.

Q. Didn't you say such a procedure had been suggested by your legal counsel?

A. That is not a correct statement of what was suggested.

Q. Didn't you say that you would welcome such an opportunity?

A. "To join forces to collect our mutual accounts," I believe are the words used. [539]

Q. Didn't you have an occasion to prepare a total number of operating hours for all those cats of Tope's after the job was all over?

A. Not that I recall.

Q. You were shown Exhibit 2, which is entitled "Cost of Operation." I believe you testified, Mr. Hancock, that that could hardly be a really true reflection of the actual cost of operation of those cats, didn't you? A. I did.

Q. Were you asked by any one connected with this case to ever prepare your estimate of the actual cost of operation of Tope's cats alone, just Tope's?

A. No.

Q. Could you do it from the records available to you? A. I seriously doubt it.

Q. Now, Mr. Hancock, are you sure that the

(Testimony of William Harris Hancock.)

compilation, now Exhibit 9, was made an addenda to a letter in April to Northern Commercial Company?

A. I am not positive of the date to which it was an addenda.

Q. Did you testify in response to a question on [540] direct examination that when you visited Mr. Bayless at Tok Junction concerning the three thousand dollar fuel bill claim that Mr. Bayless was not antagonistic? A. I did so testify.

Q. And by that, what do you mean, Bayless was not antagonistic towards Oaks or Stuart?

A. I meant that Mr. Bayless was friendly toward me and Oaks Construction Company.

Q. You discussed that three thousand dollar NSF check on that occasion with Mr. Bayless, didn't you? A. I did.

Q. Did you suggest to Mr. Bayless that he prosecute Mr. Tope on that check?

A. I did not.

Q. Did you state now that you did not suggest that to Mr. Bayless?

A. That is just what I stated.

Q. You deny that you suggested that he prosecute Mr. Tope?

A. I deny that I suggested that he prosecute Mr. Tope.

Q. Now, do you deny that you suggested that he pursue Mr. Tope by any means available, [541] in an attempt to collect that money?

A. I asked Mr. Bayless to take the ordinary and

(Testimony of William Harris Hancock.)

normal methods that would be available to him to collect his check before we paid the account for him, and I told him at that time that we would be happy, that we would pay the check if he couldn't collect it, but that we would reimburse him for any funds that he expended for legal advice in trying to collect it. That was the substance of our conversation.

Q. Is your memory now better than it was when I took your deposition and asked you questions concerning that interview with Bayless?

A. I don't believe that is a question I can answer, Mr. Nesbett.

Q. Do you recall telling me, during the course of that deposition, that you couldn't recall suggesting to Mr. Bayless that he prosecute Tope on that check?

A. I did not suggest to Mr. Bayless that he prosecute that check, and I cannot recall that I did not suggest.

Q. You can't recall, can you, what you said in your deposition?

A. I think that you can refresh my [542] memory.

Q. I'll ask you, Mr. Hancock, if you did not, in giving your deposition in this case, on the date of February 7, 1957, at my notice and insistence, and Mr. Dunn present, testify as follows, with respect to the questions as I shall read them and the answers which follow?

Mr. Dunn: Objection, your Honor, I want—I

(Testimony of William Harris Hancock.)

would like to have Mr. Nesbett tell me where he is reading from, and I would like to have the witness furnished with a copy of the deposition so that he too can follow Mr. Nesbett.

The Court: Of course, he doesn't have to do that, tell you where he is reading from. The witness should be shown the deposition, if he wants to look at it.

Mr. Nesbett: Do you recall the following questions and the following answers at that time, and at that place, and on that date?

Mr. Dunn: Your Honor, objection until he has given the witness the deposition.

Mr. Nesbett: Give me a chance. I will tell him page 31, and I am starting at [543] line 9.

Q. (By Mr. Nesbett): "Question: You don't recall whether you told Mr. Bayless to prosecute Mr. Tope for the check? Answer: No.

"Question: Your answer was what? Answer: I do not recall having told him that.

"Question: Do you recall any of the discussion with Mr. Bayless about that check? Answer: Yes.

"Question: What was the discussion in general? Answer: I simply explained to him that Mr. Tope was indebted to us on the contract and we were in the hole badly because of that and asked his co-operation in trying to collect on the bad check.

"Question: Did you offer to pay Mr. Bayless' expenses in prosecuting or attempting to collect the check? Answer: I told Mr. Bayless that we would pay the check; we would pay the three thousand

(Testimony of William Harris Hancock.)

dollars if he was not able to collect it, and if he incurred any additional expense in trying to collect on the bad check that we would take care of that.

“Question: If I told you that Mr. Bayless had signed an affidavit to the effect that [544] you, on behalf of Oaks, had offered to pay his expenses in prosecuting Mr. Tope for that check, would you say that was incorrect? Answer: I don’t know what affidavit Mr. Bayless has signed.

“Question: Well, I just merely stated to you if I told you that I have such an affidavit in my files, would you say that Mr. Bayless was incorrect nevertheless? Answer: I don’t recall telling Mr. Bayless to prosecute.”

Mr. Dunn: Your Honor, I object to his having to answer that question; he can’t possibly keep all that in mind. And I objected before it was asked on the grounds the witness should be furnished the deposition.

The Court: That was not the procedure, but the witness has testified to the same thing here. I don’t see any contradiction in his testimony.

Mr. Nesbett: Well, there is quite a bit, your Honor.

The Court: Well, very well.

Q. (By Mr. Nesbett): Do you state now that you positively did not suggest to Mr. Bayless that he prosecute on [545] that check when you visited him at Tok Junction? A. Yes.

Q. Did you not state in response to a question

(Testimony of William Harris Hancock.)

when the deposition was taken that you didn't recall telling——

A. That is what I stated.

Mr. Nesbett: That is all, your Honor.

The Court: Any redirect?

Mr. Dunn: Very little, your Honor.

Redirect Examination

By Mr. Dunn:

Q. This Exhibit P of the defendant's, was that prepared for N. C. Company or was it prepared because of negotiations with N. C. Company?

A. It was prepared to illustrate the points in my letter to N. C. Company.

Q. Was it prepared for the purpose of that letter? A. Yes.

Q. Now, I hand you this letter and ask you whether or not this is the one you used to transmit to the Northern Commercial Company the information set forth in Plaintiff's—Defendant's Exhibit P? A. Yes; it is. [546]

Q. When is that letter dated?

A. August 5, 1954.

Q. Does that aid you in setting the time that you prepared Exhibit P? A. Yes; it does.

Q. Do you wish to revise your previous statement as to when you prepared Exhibit P?

A. In the light of this date, it would have been, the approximate time that this was, this letter was written, August 5.

(Testimony of William Harris Hancock.)

Q. Well, would it, in any event, have been after the Stuart Construction Company work was through and all of the cat hours were in?

A. Yes.

Q. With respect to account No. 34 in the general ledger of Stuart Construction Company, which has been introduced into evidence, I understood you to testify to Mr.—in response to Mr. Nesbett's question, that the twenty-six thousand dollars reflected in account No. 34 was what you computed as late as September of 1954, as being due to Oaks from Stuart Construction Company; was that your testimony to Mr. Nesbett? A. Yes.

Q. Well, did that final statement of [547] account continue to change from time to time?

A. Yes; well, there was one major change.

Q. Well, in any event, is it one that is now evidenced by—is it one that is now evidenced by Defendant's Exhibit O, the final and correct one?

A. It is.

Mr. Dunn: No further questions.

The Court: That is all now of this witness?

Mr. Nesbett: No, your Honor; I have a few questions.

(Testimony of William Harris Hancock.)

Recross-Examination

By Mr. Nesbett:

Q. Now, if Exhibit P, or the compilation of cat hours was appended to a letter in August to Northern Commercial Company, why did you first testify that you thought you had compiled it in the middle of April?

A. My reason for testifying that is that my memory was not too good on the dates, primarily because there were several letters to N. C. Company in connection with the cats and their claims for payment.

Q. Didn't you select the date, the middle of April, as being the approximate date, because the last [548] date any Caterpillar is shown as having been operated on this exhibit, Exhibit P, was April 9?

A. No; I did not. I selected the date originally because N. C. first made a claim shortly—or possibly around that date, about April 16, and I knew I would be replying to them.

Q. Well, you have looked at these compilations before coming into Court here today, haven't you?

A. Yes.

Q. Do you know that the last date shown for utilization of any of Tope's cats is April 9, do you not?

A. If that is the figure there; I don't have it memorized.

(Testimony of William Harris Hancock.)

Q. Well, if you prepared this compilation for a letter that you sent in August, why didn't you use any dates subsequent to April 9, in showing utilization of a Caterpillar?

A. The only reason that I can think of for that would be that the cats were not operating.

Q. Then, would it be your testimony that since no use is shown after April 9, on any Caterpillar of Tope's, that, therefore, your records reveal to you that no Caterpillar of Tope's was used after April 9?

A. That is right. [549]

Q. And your records must have so reflected at the time you wrote the letter in August?

A. That's right.

Mr. Nesbett: That's all, your Honor.

Mr. Dunn: No questions, your Honor.

The Court: Very well; call your next witness.

(Whereupon, Mr. Hancock was excused from the stand.)

Mr. Dunn: Your Honor, Mr. Hancock is working; he is available on relatively short notice by telephone; I wonder if he can be excused to go back to his job, and possibly with an hour or so delay, if he is to be recalled——

Mr. Nesbett: I have no objection.

The Court: Very well.

Mr. Dunn: May I continue, sir?

The Court: Yes; you may.

Mr. Dunn: I would like to call Mr. McMahan.

C. J. McMAHAN

called as a witness for and on behalf of the Defendant, and, being first duly sworn, testifies as follows on:

Direct Examination

By Mr. Dunn:

Q. Will you state your name, please? [550]

A. C. J. McMahan.

Q. Where do you live, Mr. McMahan?

A. In Palmer.

Q. Were you subpoenaed to appear in this action? A. I was.

Q. Mr. McMahan, are you acquainted with the clearing of a right of way or what is commonly called the Haynes Pipeline, between Fairbanks, Alaska, and proceeding from there northerly, toward the Canadian Border? A. Yes, sir.

Q. Did you ever have any occasion to do any work on that line? A. I did.

Q. What did you do?

A. I worked on one hundred miles of pipeline clearing it.

Q. Clearing the right of way?

A. Yes; on the pipeline.

Q. What was your status on the line; for whom did you work and under what condition?

A. I had a contract from Oaks Construction Company.

Q. How much line did you have?

A. One hundred miles.

Q. Do you know Stuart E. Tope? [551]

(Testimony of C. J. McMahan.)

A. I know the man.

Q. Did you see him working on that same job?

A. He was next to me there, north of me; I know he was working there.

Q. He had the stretch north of you?

A. He did.

Q. Who had the most northerly stretch?

A. I believe a man named Miller had that.

Q. There were three of you altogether, then?

A. Three outfits.

Q. Do you know under what type of arrangement Miller worked? A. No; I don't.

Q. What is your business, generally?

A. Prospecting, gold mining, land clearing, working around equipment, with equipment—heavy equipment.

Q. Speaking in relation to time, what experience have you had in connection with clearing and the use of heavy equipment, over how many years?

A. Well, I started running tractors in Alaska around 1923.

Q. Have you been at it since?

A. I have been more or less at that work since that time.

Q. Well, by tractors, do you include [552] bulldozers? A. Yes.

Q. Is that what is commonly called a "cat"?

A. Yes.

Q. Have you had any experience in operating heavy equipment of that nature in sub-zero temperatures? A. Quite a bit of it.

(Testimony of C. J. McMahan.)

Q. Well, does it take any particular know-how to operate in sub-zero temperatures as compared with just an ordinary operation?

A. I believe it would take an experienced man; I think experience would have a lot to do with it, with the kind of work you turned out.

Q. How did the type of work that you did compare with that of Stuart Construction Company or Tope?

A. Practically the same, I believe.

Q. Same kind of work?

A. The idea was the same.

Q. Are you familiar with that country from the Canadian Border to Fairbanks, over which this pipeline runs, generally?

A. Quite familiar, I would say, I was.

Q. Are you sufficient—have you been up and down over that area a number of times?

A. I have.

Q. Are you sufficiently familiar with that country to [553] form an opinion as to the relative difficulty of clearing the three sections?

A. Yes, sir.

Q. Who would you say of the three, based on your opinion—and giving your opinion based on your experience, rather, who would you say of the three, yourself, Stuart Construction Company, or Miller had the easiest stretch?

A. Well, I always felt that Tope had the easiest.

Q. What made you think his was the easiest?

(Testimony of C. J. McMahan.)

A. There is a great deal of flat land in that area that he had.

Q. Well, how about rocks, you wouldn't call rocks easy, would you?

A. Well, there were some difficult spots on that route probably, but there was more flat land in that area than the area that I had or in the area Miller had either.

Q. Well, did you finish your job, Mr. McMahan?

A. I did.

Q. Finish it on time? A. I did.

Q. Make any money?

A. Made some money on it.

Q. Did—during the time you were working on that job, [554] did you know a fellow by the name of Roy Crawford? A. I did.

Q. Did you know a fellow by the name of Vince Abbott? A. I knew him, yes.

Q. How about a chap by the name of Hager?

A. I knew him.

Q. Did you know Mr. Oaks?

A. I knew Mr. Oaks well.

Q. Did you know this fellow, Butcher?

A. I knew him very well, too.

Q. How did those people treat you?

A. Very fine.

Q. Did they tell you how to run your job?

A. They said nothing to me at all about running the job.

Q. Did they hire your men?

(Testimony of C. J. McMahan.)

A. I hired my own men; they had nothing to do with it.

Q. Did they try to fire your men?

A. They never had any word at all about it.

Q. Well, did they—they didn't try to hire your men or anything in connection with your job?

A. They never interfered with me at all.

Q. Did they offer to do anything?

A. No; I didn't think they did.

Q. Just stayed out of your way? [555]

A. Just stayed out of my way, entirely.

Q. Did—how long did you have to finish your job?

A. About—it was over one hundred days, maybe one hundred and twenty days.

Q. That was in your subcontract?

A. That is right, I had one hundred and twenty days to do that one hundred miles in.

Q. Did you ever talk to Roy Crawford?

A. I did.

Q. Did you ever talk to him specifically about getting any more cats on your spread?

A. Well, he talked to me about it; he brought the thing up and wanted to——

Q. What did he bring up and what did he say?

A. Well, he said that Williams Brothers were getting a little anxious to get the work done and wanted to know if it would be all right with me if they could put some cats on the north end of my job there, near the Tanana River, and I told them that Roy told me—he said, “Now, we can't

(Testimony of C. J. McMahan.)

put them in there unless you say the go-ahead.” And I told them if they wanted to go ahead and put those cats in there, without any expense to me at all, why to go at it, that we would just get through that much earlier on the job. [556]

Q. I don't suppose they put them in then after you said—— A. They put them in.

Q. They did put them in at no expense to you?

A. No expense to me at all.

Q. May I have Exhibit 3, please?

Mr. McMahan, I hand you an instrument that has been designated Plaintiff's Exhibit 3, and I direct your attention to the last three pages of it. And I will tell you that it has been offered for the purpose of proving the number of hours that the cats of Stuart Construction Company, or Stuart Tope, worked on his spread up there. And I ask you to look at it for a minute or two until you feel you are familiar with it, until you understand it, and tell me when you feel you can answer some questions on it.

(Witness perused the exhibit.)

A. O.K., I will answer your questions.

Q. Do you see what it is, all right?

A. I do.

Q. Now, that exhibit covers what period of time?

A. It covers the month of—it covers the work of three cats.

Q. Well, what I mean, what dates does that ex-

(Testimony of C. J. McMahan.)

hibit [557] cover? What months are mentioned there?

A. January, February, March, and April.

Q. Now, you stated, did you not, that you had approximately twenty years of experience with cats?

A. Yes, sir.

Q. And you are also familiar with the area between Big Delta and Tok?

A. Yes.

Q. Do you know what the weather is like up there in the wintertime?

A. Yes.

Q. Well, now, Mr. McMahan, based on your experience and your knowledge of the type of work to be done, namely, clearing the right of way through virgin country, and the time of year, namely, January and February and March, through there, and the location up in the interior, between Tok and Big Delta, and given the added information that the equipment used to clear, was used equipment, I don't say it wasn't in good shape at all; I don't say yea or nay on that, but merely that it was used, can you form any opinion as to accuracy of this equipment?

Mr. Nesbett: I'll object to that question, your Honor, first of all, it is too [558] broad; the witness couldn't possibly answer it with any intelligence, covering one hundred miles, a one hundred-mile area, and the recap covering a period of months and on three Caterpillars. If there is any answer ready to be given, it must be a rehearsed answer; and, as I say, I don't think the witness is competent to answer.

(Testimony of C. J. McMahan.)

The Court: Well, if he has an opinion about—he used cats, had cats on his job, it is the same; I understand this is a compilation of the time employed in which these Caterpillars were employed, that is, Exhibit 3.

Mr. Nesbett: That is recap.

The Court: Call for his opinion as to whether or not it is accurate or not.

Q. (By Mr. Dunn): Do you have any opinion as to the accuracy of that exhibit?

A. I have an opinion.

Q. What is that opinion?

A. I don't think a man could keep his cat working those number of hours there in January and February.

Q. Why not? A. Well——

Q. Rather, here, let me restate that. On what do you [559] base your opinion?

A. Time of the year, for one thing, cold weather.

Q. What does this——

A. Equipment, the age of the equipment, it is not brand new; it had been used. It might be in good repair, but you can always have trouble with that equipment, even with the new equipment, you could.

Q. Does not this exhibit show that all three of these cats worked not less than fifty-four hours a week from January through the middle of February? A. That is what it shows.

Q. Is that possible, Mr. McMahan?

A. It might be possible, it might be possible, but

(Testimony of C. J. McMahan.)

it is not likely. I don't think that man could go up there and work that number of steady hours with that equipment, without having some trouble.

Q. Do you think there would be a break-down some place along the line?

A. They are going to have trouble getting that equipment started in the morning. How are you going to get nine hours a day in like that?

Q. Well, now, speaking of nine hours a day, let's take the month of January, in the vicinity of [560] Tok Junction, how much daylight have you got up there in January?

A. Well, it is a little longer than December, but you still have pretty short days there in January.

Q. Have you got nine hours of daylight?

A. I would say not.

Q. Did you clear any of that right of way at night up there? A. No; we didn't.

Q. Do you—does not this exhibit reflect six 9-hour days every week? A. It does.

Q. Without a break-down of the cats?

A. Without a break-down, no delay there at all.

Q. How was your payroll handled, Mr. McMahan?

A. Oaks Construction Company advanced our pay—didn't advance our pay, but as we went along we were paid weekly by the Oaks Construction Company.

Q. Were your men paid directly by Oaks Construction Company? A. They were.

Q. Did you get any money weekly?

(Testimony of C. J. McMahan.)

A. I got a salary; I got my wages, too.

Q. Was any adjustment made for your wages when you [561] got the job?

A. Well, any money I had coming from Oaks Construction Company, they paid me. Is that what you are asking me?

Q. When they made final settlement with you, how did they take your wages into consideration?

A. Deducted that from my contract.

Q. So your wages actually amounted to a drawing account?

A. This was drawn off of my contract.

Q. Now, about the time that you were getting ready to start this job, did you have—did you overhear Stuart Tope talking on the telephone in the ACS office at Tok Junction in connection with getting part of this right of way to clear?

A. Yes; I did.

Q. What did you hear?

A. Well, I don't know just what I did really hear, but I know that he was quite interested in getting on that pipeline job from the way he talked.

Q. Wanted it bad?

A. Beg your pardon?

Q. He wanted it bad?

A. That is the way it sounded to Schmidt and—Fred Schmidt and I; Schmidt was there and he heard the [562] thing and we made a little remark about it, and thought we better get in on the job if we were going to get in on it, something to that effect.

(Testimony of C. J. McMahan.)

Q. Did you see Mr. Tope from time to time as this job progressed?

A. As we started in there, I saw Mr. Tope.

Q. Did you observe his operations enough, or spend enough time with him to form any opinion as to his experience, or his ability to manage a right of way job in the middle of winter?

Mr. Nesbett: I think there should be some sort of foundation laid for that, your Honor, at least, how much time he spent around Tope's operation.

The Court: Of course, that is right, he said he saw him from time to time and all that can be elicited on cross-examination; although, we ought to eliminate as much as we can.

Mr. Dunn: I don't think that is important, your Honor, and I am not going to worry about that.

Q. (By Mr. Dunn): Did you notice what Mr. Tope did with his cat at night?

A. Fred Schmidt and I drove down there one night [563] in our pickup and the two cats were running, with nobody around at night in the dark, so I assume he was doing that to keep the machines warm, so they would start in the morning.

Q. Do you consider that good practice?

A. No; I don't.

Q. How did you handle yours?

A. Well, as soon as we quit at night, we covered it up with a big tarp and put about seven pole yard lanterns and tried to hold what heat was in there, and also maintain some heat during the night; that

(Testimony of C. J. McMahan.)

way we were able to start right away in the morning and get going.

Q. Did your cats start in the morning?

A. Started very good.

Q. Did you ever have an occasion to observe Tope's care of equipment; how he took care of equipment?

Mr. Nesbett: Now, again, your Honor, I will ask that some foundation be laid for asking a broad statement of that question?

The Court: As to what opportunity he had to observe his work with equipment?

Mr. Dunn: What opportunity, Mr. McMahan, have you had to observe the care that Tope gave his equipment? [564]

A. Well, Tope and I took a trip to Fairbanks once in his pickup, and I went to Fairbanks with him and we had some trouble coming back out there and I asked Tope to stop and told him that we maybe better look at that, but Tope didn't think it was serious, apparently, and let it go, and we kept going until finally the machine quit on us, and then we did get going again; then we—I remember that night it was pretty cold and we went from that point to Tok, it was this side of Big Delta, without any heater in the car and it was cold weather and we kind of kidded ourselves along about that a little bit, where maybe if we would have stopped and corrected the thing, we might not have—we would not—we might have had a heater to help us.

(Testimony of C. J. McMahan.)

Q. Was it just the heater in the car? Was that all that was wrong with it?

A. Well, we got it going anyway, but that was the thing that really——

Q. What stopped it, caused it to stop?

A. Well, I don't know what the trouble was?

Q. And——

Mr. Nesbett: I will object to any more of this without specific instances. [565]

Mr. Dunn: I think the objection is well taken, I thought the witness had more information than he has. I have no further questions, your Honor.

Cross-Examination

By Mr. Nesbett:

Q. Mr. McMahan, you were pretty busy up on your own clearing job, weren't you?

A. I was.

Q. You didn't have much opportunity to observe how Tope was doing his duty?

A. Just when we were together; when we started, we both started at the same point.

Q. Did you go over all of Tope's clearing area, the area that he was attempting to clear?

A. That is at the time, which might have been not more than two miles there.

Q. Just the two miles where you both started?

A. Yes; we were right there together and just drove around there one night and saw those two cats sitting there without any attention or anybody taking care of them at all.

(Testimony of C. J. McMahan.)

Q. You didn't go out and examine the area around Cathedral Bluffs or anything?

A. No.

Q. Are you familiar with the problems they ran into [566] there?

A. No; I don't know anything about that.

Q. Mr. McMahan, apparently from your answers to questions on direct examination, you were given a completely free hand with the method and manner in which you set about clearing your section of the right of way, is that correct?

A. Entirely; they didn't interfere with me in any way or suggest anything, they just came along and rode the thing over as I progressed and seemed very satisfied.

Q. Would you say that you had a performance bond for your section? Did you say that?

A. Yes; I did.

Q. What rate per lineal foot were you being paid?

A. Just under seven and three-quarters cents a foot.

Q. How much?

A. Just under seven and three-quarters cents a foot.

Q. Now, had you had an opportunity to study this Exhibit 3, Mr. McMahan, before you were handed it by Mr. Dunn?

A. No, sir.

Q. Was that your first glance at it?

A. Yes, sir.

(Testimony of C. J. McMahan.)

Q. Was your first glance your only glance at it, then? [567]

A. I looked at it right here.

Q. You think fifty-four hours per week is too much on those cats for that weather, is that correct?

A. In the winter months, I believe when it got longer there, they might have got out and put in those hours, when the daylight got longer.

Q. Did you run yours that length of time up on your job, or did you have occasion to keep track of your hours?

A. I don't think I run mine over eight hours a day, if we even got eight hours up there, but the man got paid eight hours, but to charge for a cat operating anything over eight hours a day, would not hardly be a fair thing, I don't think, at that time of the year.

Q. But at least you wouldn't operate one over eight hours a day, or you didn't do it on your job?

A. No, sir; I did not.

Q. You don't know exactly what happened on Tope's job, do you? A. No, sir.

Q. That is all.

The Court: Is that all of this witness?

Mr. Dunn: No; I have another question or two, your Honor. [568]

(Testimony of C. J. McMahan.)

Redirect Examination

By Mr. Dunn:

Q. Even though you don't know what Tope actually did, Mr. McMahan, if he ran his cats nine hours a day in January, he necessarily must have been running them at night, wasn't he? I am speaking of the length of day up there at that time.

A. Yes.

Q. And——

A. Well, that might be the way he got them to run in the morning, too, because if they run all night out there, unless he had trouble with them during the night, they would be ready to run in the morning, all right.

Q. Now, did I understand you to say that you paid your men eight hours even if they didn't operate the cat eight hours?

A. Well, they took a little time for them to get in and out there and get the machines started; they had to get the lanterns off there and the tarps off of them, and when we done that, a crank or two in the starting motor and away they would go, and we certainly were operating that cat awfully close to eight hours a day.

Q. But is it true that the hours worked by men did not reflect the hours worked by the cat? [569]

A. Not exactly, no.

Q. If a cat breaks down, does a man get paid anyway?

(Testimony of C. J. McMahan.)

A. If we tried to get the cat repaired, why, then he got paid, but the cat didn't make any money though; we weren't getting any—the cat wasn't making any money for us.

Q. You bid seven and three-quarters cents a foot? A. Yes.

Q. Could you have bid—do you think you could have bid any lower; do you recall?

A. No; I don't.

Mr. Dunn: No further questions, your Honor.

Recross-Examination

By Mr. Nesbett:

Q. Do I understand you, Mr. McMahan, to say that it is a general practice that if the cat is broken down and the operators are not actually working to repair it themselves, that they are not paid?

A. If there is not anything else for him to do, I would think that would be the general practice.

Q. Well, is it general practice?

A. It is; if they work, they get paid; if they don't work, why, they don't get paid.

Mr. Nesbett: That is all. [570]

Mr. Dunn: No questions, your Honor.

(Whereupon, the witness was excused from the stand.)

The Court: We will have a short recess; Court stands in recess for five minutes.

(At 4:00 o'clock p.m. a five-minute recess was taken.)

After Recess

Mr. Dunn: I would like at this time to read the deposition of Roy S. Crawford, who has been talked about here.

The Court: Very well.

Mr. Dunn: Mr. Nesbett, this is a rather long one, would you be good enough to help me with it; you have a copy of it, don't you?

The Court: It would make it more understandable if whoever reads the answers would take the witness stand, sit on the witness stand and let counsel read the questions and you read the answers. It makes no difference to me if you prefer to do it some other way.

Mr. Dunn: It makes no difference to me.

The Court: It is easier for the Reporter, of course; however, the Reporter will not have to report the deposition. [571]

Mr. Dunn: Your Honor, Mr. McMahan would like to know whether or not he can now be excused?

Mr. Nesbett: As far as I am concerned, yes.

Mr. Dunn: He may as far as I am concerned, your Honor.

The Court: You may, Mr. McMahan, and thank you, very much; you may be excused.

Mr. Dunn: Would you prefer to have me sworn to take the witness stand, your Honor?

The Court: No; you gentlemen do it in your own way. If there were a jury here, it would be proper, I think, for one to take the witness stand, because the jury can then understand it.

Mr. Dunn: Well, I shall read the questions and you read the answers, Mr. Nesbett.

Mr. Nesbett: That's all right with me.

Mr. Dunn: Now, your Honor, the deposition of Roy S. Crawford was taken at the instance of the defendants, Seattle, Washington, January 10, 1958, at the hour of 3:00 o'clock, Buell A. Nesbett, appearing for the plaintiffs, [572] and Butcher & Dunn, also Mr. Kahin, and Messrs. Carmony & Horswill, by Pickney M. Rohback, appearing for the defendants.

DEPOSITION OF ROY S. CRAWFORD

"whereupon, the following proceedings were had, to wit:

"Roy S. Crawford, being first duly sworn, testified on oath as follows:

"Direct Examination

"By Mr. Rohback:

"Q. Would you state your name, sir?

A. Roy S. Crawford.

Q. And your residence address?

A. 9009-20th N.E.

Q. Seattle, Washington?

A. Seattle, Washington.

Q. By whom are you employed here?

A. Boeing Airplane Company.

Q. Now, sir, is there a likelihood as to whether or not you will be in the Territory of Alaska during the year 1958?

A. I doubt it very much.

(Deposition of Roy S. Crawford.)

Q. In January, 1954, by whom were you employed? A. Oaks Construction Company.

Q. And that company was a partnership at the time?

A. I believe it was. I never saw the papers.

Q. And they were operating in Alaska, were they? [573]

“A. In Anchorage—out of Anchorage.

Q. Just for identification, can you give us the particular contract that they were working on at that time, out of Anchorage?

A. The one I was on was the pipeline between Fairbanks and Haines, Alaska.

Q. And do you know the name or identification of the general contractor or the prime contractor?

A. That was Williams Brothers Company, McLaughlin, Inc., and Marwell Construction Company, Ltd.

Q. Now, then, in reference to the work of your employer, Oaks Construction Company, did you have anything to do with the work in Alaska prior to January, 1954?

A. Yes; I helped them on looking over the line and writing parts of the subcontracts, and a few contracts with the Army Engineers. That was all in December, 1953.

Q. Were you in Alaska continuously from December, 1953, through the spring of the year 1954?

A. Well, I was on the pipeline, but the pipeline was in Canada and Alaska.

Q. What I meant was, from December, 1953, did

(Deposition of Roy S. Crawford.)

you at any time return to the States before the 6th of January, 1954?

A. Yes; in December, for Christmas of December, 1953; I went out just before Christmas. [574]

“Q. You come back to Seattle?

A. Yes; and came back about the second or the third of January.

Q. So you were in Seattle, Washington, then, for a period of approximately a week or a week and a half? A. Something like that.

Q. Now, in reference to the pipeline work of your employer, Oaks Construction Company, in Alaska, did they use any subcontractors on the job?

A. On the clearing they had subcontractors.

Q. Who were they?

A. For the first 100 miles out of Fairbanks to Big Delta, it was Miller Construction Company, and from Big Delta to Tok Junction, it was—I believe he called it Stuart Construction, and from Tok Junction to the border it was two partners, McMahan and Schmidt.

Q. What was your connection with Oaks Construction, or the title of your job while you were up there?

A. I was General Superintendent on the clearing, first of all, in Alaska, and when we were in Canada, I was down there also in combination with other work.

Q. Now, I believe you advised us that you had done some preliminary work on the special condi-

(Deposition of Roy S. Crawford.)

tions or specifications of the subcontract; is that right?

A. Yes. All I set up, though, was the special conditions in general. I had nothing to do with the details [575] included in each contract. As far as I can remember, that had all been done while I was outside.

“Q. You didn’t negotiate the contracts?

A. No.

Q. When you were preparing these special conditions, did you know who were going to be the subcontractors?

A. No; I had no idea at that time.

Q. Can you tell us whether or not these special conditions which you prepared for these subcontracts were used in the subcontracts?

A. Yes.

Q. And was there a different set of special conditions for each subcontract, or did they use the same sets?

A. No; it was the general subcontract form that was made up, and they all used it, and any variations would have been a separate entry, such as unit price. Any difference was set up.”

Mr. Dunn: And then there is a notation: “Photostatic copy of document marked Exhibit A for identification and attached hereto.” I don’t know what that is, your Honor; may I see the deposition?

The Court: I suppose this is it in the original.

Mr. Dunn: Are you following it, sir?

(Deposition of Roy S. Crawford.)

The Court: No; I am listening. You [576] may have that if you want it. I suppose it was a form of contract?

Mr. Nesbett: It was.

Mr. Dunn: I was going to ask Buell if he was there, what is it? You said, your Honor, that I might use it?

The Court: Yes; you may.

Mr. Nesbett: It will come out as you read the deposition.

(Mr. Dunn continued reading the questions and Mr. Nesbett continued reading the answers.)

“Q. Mr. Crawford, I have marked as Exhibit A, or had marked by the court reporter, a photo-static copy of a document which purports to be an agreement between Oaks Construction Company, as general contractor, and Stuart Construction Company, bearing date of December 17, 1953. I want to show you this document and ask you if any portion of it contains the special conditions which you referred to as having prepared for the three sub-contracts in Alaska?

A. You mean what part?

Q. Yes.

A. It would be Article XXI, subparagraphs 1, 2, 3, 4, 5 and, actually, just the outline in 6. I didn't enter any of the station data. [577]

“Q. What does subsection 6 of Article XXI refer to?

(Deposition of Roy S. Crawford.)

A. That is the location of the work.

Q. Now, this Exhibit A is a copy of a subcontract with Stuart Construction Company, is it not?

A. Yes.

Q. Would you show that to Mr. Nesbett, to see if he agrees, so that there will be no question about it?

A. (Witness hands Exhibit A for identification to Mr. Nesbett.)

Mr. Nesbett: It appears to be.

Mr. Rohrback: As I understand, Mr. Nesbett, there is an actual copy of this contract with Stuart Construction Company attached to the complaint, in the action, is there not?

Mr. Nesbett: I believe there is.

Mr. Rohrback: What I am thinking of, there would be a way to in some way check this copy with something else, to determine if it is correct?

Mr. Nesbett: That is correct. The reason I say "it appears to be," it is either the original copy or one of the original signed copies attached to the complaint or that has been introduced in prior depositions. This is about the seventh deposition, and I say "it appears to be," because I think it is the same contract. [578]

"Q. Now, sir, in reference to the special conditions that you prepared, and for identification, please, can you tell us whether those conditions were used in any of the contracts that might have been entered into in reference to the work in Canada?

(Deposition of Roy S. Crawford.)

A. Not exactly; in general content, yes, but the contract in Canada was written by a lawyer down there. Essentially it was an agreement that was actually made right in front of the lawyer, and the conditions of this contract or the form of this contract was never even taken down there. So I would say as to the general idea, yes, but the details, no.

Q. You were not present when this particular contract with Stuart Construction Company was signed? A. No.

Q. Now, sir, can you tell us in reference to the three subcontractors which you have identified as having worked, as having done work for Oaks Construction Company in Alaska—whether the employees of those three subcontractors were carried on Oaks' payroll?

A. They were all carried on Oaks' payroll. All of the men in Alaska were carried on the Oaks Construction payroll.

Q. Now, what did you have to do with the payroll which would give you knowledge of that [579] fact?

“A. For the first period of the contract of roughly two months, the payroll was sent to me or my wife in Fairbanks, and we delivered it down the line to the subcontractors, and they passed it on to their men.

Q. What can you tell us in reference to the subcontractors themselves—whether they were carried on the payroll of Oaks Construction Company?

A. Tope was carried, and McMahon, and

(Deposition of Roy S. Crawford.)

Schmidt were carried, and I believe Miller, but I am not sure.

Q. And in what position or what job identification would those men be carried?

A. I can't remember; probably as superintendents or something like that. I don't know.

Q. Now, did you have anything to do with the negotiations between Oaks Construction Company and the various subcontractors to carry their men or themselves on the payroll?

A. Did I have anything to do with it?

Q. Yes. A. No.

Q. Do you know why it was?

A. By hearsay, just to help them along, to give them money to operate on, and it was also easier. There is quite a period from the time you award a subcontract until the man gets his first payment. It might be six weeks and sometimes two months, and this was to give the subcontractors [580] a little money to help them along.

“Q. Now, then, do you recall a conversation with Stuart Tope in January, 1955, at the Tok Lodge in reference to the subcontract he had with Oaks?

A. Yes, I remember him saying that he would be done in a very short period of about six weeks, which was quite a surprise to me, and that is why I think I remember it—that he could clear and compact one hundred miles of right-of-way. He was bragging about how much money he was making as a result, which would be a very good profit if he could do it in six weeks.

(Deposition of Roy S. Crawford.)

Q. This conversation then was concerned with the time it was going to take him to do the job and the profit he expected to make, is that right?

A. Yes.

Q. Now, can you identify for us the area that Stuart Tope or Stuart Construction was to do this work on?

A. Well, roughly, it is from Big Delta to the pumping station, about four miles north of Tok Junction. His job ended right exactly at the pumping station. On the other end it was really Buffalo Lodge at Big Delta. I could point it out.

Q. Can you give us an estimate of the miles of line that that covered?

A. Very close to 100 miles. [581]

“Q. Can you tell us, sir, how did that area that the Stuart Construction Company was to do its work in compare with the area that Miller had, or the area that McMahon and Schmidt had?

A. I believe it was easier, in that the terrain was not so rough.

Q. How about in distance—how did the three compare?

A. Very close; within five to ten miles or less.

Q. The contract which is Exhibit A actually refers to stations by number. Where would one obtain the information on the exact location of those stations mentioned in the contract?

A. They are in the Army Engineers' drawings—turned out by them, and are a part of the Master Contract.

(Deposition of Roy S. Crawford.)

Q. Now, sir, as the three subcontractors progressed, can you tell us whether or not you had anything to do with making out progress reports for them?

A. Yes, I made out progress reports at the end of a pay period. We made an agreement with the Army engineer on the job for payment of footage completed on each one of these sections, and then we advised each one of these subcontractors that according to the Army engineer, and by agreement with him, we were able to pay this footage because the government in effect was paying us that footage. [582]

“Q. Now, did you make out progress reports for the subcontractors for the whole job?

A. I made one out. I know I made at least one out early in the job.

Q. Now, why would you cease?

A. At that time I was supposed to stay in Alaska and handle the payments, but we moved into Canada, and I just didn't have the time to be doing all the paper work.

(Document marked Exhibit B for identification and attached hereto.)

Q. Now, sir, showing you what has been marked by the court reporter as Exhibit B, would you identify that for us?

A. Yes, this is the report I made out on the completion of each area under the subcontracts in

(Deposition of Roy S. Crawford.)

Alaska, which resulted in an agreement with the Army Engineers.

Q. Now, Exhibit B is an estimate for work completed by each of these subcontractors mentioned?

A. That is right.

Q. And included in this is the Stuart Construction Company? A. Yes.

Q. Mr. Crawford, did you prepare this document which is Exhibit B? A. Yes.

Q. I note that this is a copy, is it not?

A. Yes. [583]

“Q. And where were copies of this document, Exhibit B, sent?

A. That would be to each one of the men in Oaks Construction Company—for example, Butcher, Noonan, and Oaks.

Q. Those were the three partners?

A. At that time.

Q. Were copies sent to anyone else?

A. Oh, yes, copies, carbon copies to the Anchorage office manager, to the Oaks Construction Company engineer, and the cost engineer.

Q. Is what we have marked as Exhibit B a true and correct copy of the ones that you would have actually signed?

A. Yes, I am sure that must be.

Q. You have examined it, have you not?

A. Yes.

Mr. Rohrback: It is my understanding that the procedure now, as Mr. Nesbett tells me, will be that this document will not be offered in evidence at the

(Deposition of Roy S. Crawford.)

time of this deposition, but that we will furnish him a copy now, and that the document itself will be offered at the pretrial conference in Alaska.

Mr. Nesbett: Mr. Rohrbach, if I have any questions to ask the witness about the validity of how that was prepared, I should do it now, so that you [584] can correct any deficiencies. Let me take another look.

(Document marked Exhibit C for identification, and attached hereto.)

Q. Now, showing you what has been marked for identification by the court reporter as Exhibit C, would you identify this document for us?

A. Yes, I made this out. It was taken from this previous exhibit—I guess it was Exhibit B—and typed up for Stuart Tope as a request for payment to Oaks Construction on the amount of work completed, in footage only, a percentage of the footage.

Q. Now, do you know whether he signed the original of that letter?

A. Yes, he signed it. I brought this down to him to show him what we had been able to reach an agreement on with the Army engineer as to the payment for him, and if it was acceptable to him, I asked him to sign it, and we would send it in to Anchorage to help expedite the payment to him, and he signed it, and I mailed it for him.

Q. Now, sir, this document—I believe I am correct—refers only to the number of lineal feet which had been completed?

A. That is right. [585]

(Deposition of Roy S. Crawford.)

“Q. It does not refer to the payment that is now due under the subcontract?

A. That is right; there is no dollars there; it is only work accomplished in units of measure of footage.

Q. Let me ask one more question about Exhibit C. Did you also prepare a similar request for payment for the other two subcontractors on the Alaska job?

A. Oh, yes.

Q. And they would have signed theirs, too, the same way?

A. Yes.

Mr. Nesbett: You say you saw Mr. Tope sign this?

The Witness: Yes, when he gave it back to me.

Mr. Nesbett: Where was he when he signed it?

The Witness: It was at Tok Lodge, I believe. I am not exactly sure, but I am almost certain it was at Tok Lodge.

Mr. Nesbett: It was prepared by you and taken to him?

The Witness: That is right. He didn't have to sign it, if that is what you mean, but it was just to show him what we were able to agree on with the Army Engineers, and what we would be able to pay him.

Mr. Nesbett: Did you have this in your possession prior to this deposition today? [586]

“The Witness: You mean in the last three or four years?

Mr. Nesbett: This Exhibit C?

The Witness: No.

(Deposition of Roy S. Crawford.)

Mr. Nesbett: Had you seen it before you came here today?

The Witness: I saw it a couple of days ago, when he asked me about it.

Mr. Nesbett: Do you know where it was in the meantime?

The Witness: Probably in Anchorage, as a guess.

Mr. Nesbett: I have no other questions.

Q. Now, sir, for further explanation of Exhibit C, it is dated on 6th of February, 1954, and it states it covers the work period ending 29 January, 1954. Was this in reference only to work up to January 29, 1954? A. That is right.

Q. Can you tell us, sir, whether or not this payment request, Exhibit C, covers all of the work up to January 29th, 1954, or whether it was just an advance, or what it is?

A. As I stated before, this January 29 would be the date that we met with the Army engineer and the agreement that we reached with him on that date, on work completed [587] in this area.

“Q. Now, sir, what is your recollection as to whether you continued to prepare these payment requests similar to Exhibit C for the later periods, prior to the ending of each of the three subcontracts?

A. I think I made one more out like that, and then I moved down into Canada, and I didn't have the time to do it.

Q. And then if you made another one, would it be similar in form to this one?

(Deposition of Roy S. Crawford.)

A. Essentially.

Q. Now, sir, can you tell us, in reference to the subcontractors Miller and McMahan and Schmidt, whether you made such a final estimate and payment request for them after they completed their work?

A. Yes, when they completed their work, I sat down with each one of them separately, and reached an agreement on the total footage which was taken from these drawings by the Army engineer—the drawings we mentioned before.

Q. Were you able to sit down with Stuart Tope and make such an agreement with him for Stuart Construction Company?

A. Well, he wasn't there in that area. His so-called area was finished, and we never met. [588]

“Q. Now, sir, turning to Exhibit A again, which is the subcontract, I note that under Article XVI thereof that there is the provision that the subcontractor is required to furnish payment and performance bonds. Can you tell us whether you have any knowledge, in reference to the Stuart Construction Company attempting to get bonds to comply with that contract provision?

A. Well, Oaks asked me to contact Tope several times and ask him about the bonds, and Tope told me he was trying to get the bonds, and later on I wrote him a note—I should say a letter—asking him to get the bonds. Other than that, it was all verbal.

Q. So you and Tope did have conversations with reference to getting bonds, is that correct?

A. Yes.

(Deposition of Roy S. Crawford.)

(Document marked Exhibit D for identification, and attached hereto.)

Q. Now, sir, handing you what has been marked for identification by the court reporter as Exhibit D, would you identify that, please?

A. Yes, this is a letter I wrote to Tope requesting him to get a bond.

Q. And what is the date of that letter?

A. March 22, 1954.

Q. Now, that is only a copy of the letter, is it not? [589]

A. Yes.

Q. Now, you wrote the letter itself, didn't you?

A. Yes.

Q. And you signed the original?

A. That is right.

Q. Now, what happened to the original?

A. I delivered it personally to Tope at Dot Lake Lodge. It is addressed to Dot Lake Lodge.

Q. When in reference to the date of this letter would you have delivered it to him?

A. I would say within two days.

Q. Of the date it bears? A. Yes.

Q. You do not have the original?

A. No, I gave it to him.

Mr. Nesbett: Did you write or cause this letter to be written yourself?

The Witness: I wrote the letter myself.

Mr. Nesbett: No other questions on the exhibit.

Q. Now, sir, one other question in reference to

(Deposition of Roy S. Crawford.)

getting these bonds. Do you recall any conversation that you had with Stuart Tope when he indicated that there was a possibility of his getting a particular bond for this job? [590]

“A. Yes, he told me he had an opportunity to get a bond.

Mr. Nesbett: I will register an objection on the ground that no proper foundation has been laid as to time and place and persons present.

Mr. Rohrback: Yes, that is a good suggestion.

Q. Can you tell us the particular time and place, first, as to where it occurred?

A. No, nothing other than it was one of these times I asked him about his bonds. You mean the location, such as Tok Junction?

Q. Yes. A. No.

Q. Now, in reference to time, can you tell us first whether it was before or after the date of March the 22nd, 1954, which is the date, apparently, of Exhibit D?

A. I am certain it was before that.

Q. Now, can you advise us, sir, any more definitely in reference to time—the week or month, or any such time as that?

A. January, February or March. I don't remember now.

Q. Now, can you tell us whether anyone else was present at this particular conversation?

A. I rather doubt it, because it was personal business, and I wouldn't want to talk to him about it in front of other people. [591]

(Deposition of Roy S. Crawford.)

“Q. As I understand it, you are certain it was during one of these conversations you had with Mr. Tope in reference to a bond? A. Yes.

Q. Can you tell us approximately how many of those conversations you had with him between the time of the starting of the job early in January, 1954, until the date of this letter, which is Exhibit D? A. At least three or four.

Q. Now, would you tell us what the conversation was? A. Tope told me——

Mr. Nesbett: (Interposing): I will object again for the record on the ground that no proper foundation has been laid.”

The Court: I understood by Exhibit B, he wrote a letter to him March 22, 1954. Now, the question was whether he had talked to him before that time. He said three or four times.

Mr. Dunn: Yes; now what is the question as to when? What was the question, frankly I am not sure?

Mr. Nesbett: Well, he wanted him to state the conversation and he can't lay the foundation for it in any place or month apparently.

The Court: Well, of course, he can't do that, it is some time before March 22, if there is a conversation [592] with the defendant, then he would have a right to tell what it was, if he can remember, why, of course, he should tell from the day.

Mr. Nesbett: Could we have Exhibit D and see for ourselves, your Honor, what it is?

The Court: March 22, 1954.

(Deposition of Roy S. Crawford.)

Mr. Nesbett: I was wondering if it was the same as Exhibit—if it was a copy of——

Mr. Dunn: It is already in evidence, so what are we——

Mr. Nesbett: Oh, yes, that is Exhibit D.

The Court: Counsel is entitled to the date of the conversation, but, of course, if the witness can't recall it, why, it does not bar him the right to tell what the conversation was.

Mr. Dunn: The question was on page 21.

The Court: The objection is overruled so he may answer. That is he may read his answer.

“A. Tope advised me he had had an opportunity to get a bond—but that the price that would have been charged for it was too high, and he just felt he couldn't afford it at that time.

Q. Did he identify the company that was to give the bond—that is, the company to which he had reference, or the man or the agent to whom he had reference? [593]

“A. I am sure he did, but I can't remember.

Q. Was there any conversation at this time with reference to whether Tope was going to continue to try to get such a bond?

A. Yes, that was the impression he gave me. From what he said, he was continually trying to get it.

Q. Are you aware, sir, of any time up until the time Mr. Tope left the job, when he wasn't trying to get a bond?

Mr. Nesbett: I object to that question, again, for

(Deposition of Roy S. Crawford.)

the purpose of the record as having no proper foundation laid, and the witness not being competent to answer.

Q. Let me restate the question. Did Mr. Tope at any time advise you that he had ceased his efforts to get a bond? A. No.

Q. Now, sir, you have identified for us the position you had with the Oaks Construction Company. What would be your relation then to these various subcontractors?

A. As Oaks' representative on the job.

Q. Now, did you personally at any time ever tell Tope whom he had to hire? A. No.

Q. Do you know of anyone else who was an employee of Oaks Construction Company who did tell Tope whom he had to hire? [594] A. No.

Q. Did you personally at any time tell Tope that he had to fire any particular employee?

A. No.

Q. Do you know of anyone who was an employee of Oaks Construction Company who told Tope he had to fire any particular employee? A. No.

Q. Do you know whether Mr. Tope did hire any of his own crew?

A. As far as I know, he arranged for the hiring of all his help. He might have called me up at Fairbanks—I can't specifically remember—and asked me to call the union for him, but as far as getting help, he hired his own help.

Q. Did you at any time initiate the getting of men for Mr. Tope?

(Deposition of Roy S. Crawford.)

A. Do you mean in the sense of calling the union?

Q. Yes, your getting men?

A. Yes, it is perfectly possible I did, at his request, call the union for a cat skinner or a mechanic.

Q. Now, do you know a local man by the name of Spot Harlan?

A. Yes, he is an operator-mechanic.

Q. Did you have any conversation with Mr. Tope in reference to Spot Harlan?

A. Tope wanted to hire Harlan, and the only question I had was who was going to pay him to work, because Harlan [595] didn't have a union clearance, and as a result of not having a union clearance, the Oaks Construction Company, under its agreement with the union, could not put him on the payroll.

Q. Could not put Harlan on Oaks' payroll?

A. It could not put Harlan on Oaks' payroll, and, of course, we would be carrying him on the payroll for Tope, and paying with Oaks Construction Company checks.

Q. Now, sir, other than running this employee or any employee through the Oaks payroll, did you express any objection to the hiring of Spot Harlan?

A. No, it was his responsibility to hire him.

Q. Can you tell us whether or not that would have been up to the discretion of Mr. Tope, whether he was hired, so long as he was not run through the payroll of Oaks Construction Company?

(Deposition of Roy S. Crawford.)

A. He could hire him if he could finance the payment of his wages.

Q. Do you recall another person who was either a mechanic or welder, and who had a shop, about whom there was a conversation between you and Mr. Tope on union clearance?

A. Yes, Tope wanted to put him to work, and the man didn't belong to the union, and I again told him that without a union clearance we could not put him on the Oaks [596] payroll.

“Q. Do you know whether or not Tope actually did or did not hire that man?

A. It seems to me the man had done some work for Tope, but as far as I know, he was never put through the Oaks financial route.

Q. Now, in reference to either Harlan or this last gentleman we have been talking about, did you advise Mr. Tope that he could not hire either of those men?

A. Well, what I am trying to say is that I advised him we could not put the man on the Oaks' payroll. As far as him hiring men, in the end result he had the choice.

Q. Do you remember a man by the name of Slim Allred? A. Vaguely.

Q. Do you know who hired him?

A. No, I don't know.

Q. Did you? A. No.

Q. Do you know of any instance where Mr. Allred attempted to boss Tope, or instruct him what to do on the job? A. No.

(Deposition of Roy S. Crawford.)

Q. Do you remember a man by the name of Warren Hager? A. Yes.

Q. What was Hager's position, and when?

A. Well, Hager was sent up at the start of the job to [597] locate where the right of way would run, to flag it, so that Tope, with his equipment, could stay within the boundary of the right of way and do the clearing work. But he was on the Oaks payroll, as an engineer, and he also was what you might call an inspector to see if Tope was following the terms of his contract.

Q. And he was an employee of Oaks Construction Company?

A. He was an employee of Oaks Construction Company.

Q. Do you know whether Mr. Tope and Mr. Hager got along very well on the job?

A. Not too well.

Q. Was there anything done by yourself in reference to clearing up that situation?

A. Yes, I moved Hager up to Miller's spread, or subcontract, and this man Abbott was coming up from the States. He had been out for the winter, and we put Abbott down in Tope's portion, to represent us.

Q. Now, then Abbott became the line locator and the inspector?

A. Yes, he did that, and also the terrain that Tope was working through, as it turned out, was very easy to locate in comparison with the other areas of the whole pipeline, and we offered Abbott

(Deposition of Roy S. Crawford.)

to Tope to work as foreman, because Tope at that time was having lots of equipment trouble, and spending a vast majority of his [598] time repairing his equipment, and he couldn't be in two places at once—fixing the equipment, and out where the equipment was working. But that was at his choice; I mean, the man was available, and he didn't have much work to do, and he had the reputation for operating equipment and being a good one, so we offered him to him.

Q. Can you recall the discussion with Mr. Tope in reference to Mr. Abbott—as to who else was present, if anyone?

A. Yes, it was between Tope and Jerry Noonan and myself in Fairbanks.

Q. And about when would this have been?

A. Some time in February of 1954.

Q. Now, then, at that conversation was there any mention of a man by the name of Duke Oaks?

A. Oh, yes, Tope admitted that he needed help, because, as I say, he couldn't be in two places at one time, and we offered Abbott, and he made the suggestion that we let him make Duke Oaks foreman. Well, it wasn't a case of us letting him, and there was an argument back and forth in which we said, "We can't give you Duke Oaks unless you are going to pay his wages, because that would be two men on the job. Abbott will be there to locate line, which he can do, and if you want him [599] take him and use him, and there will be no cost because we have to have a man there."

(Deposition of Roy S. Crawford.)

Q. In other words, as I understand it, there was to be no charge to Mr. Tope for the use of Abbott's extra time? A. That is right.

Q. But you said that if he wanted Duke Oaks he would have to pay him for it?

A. Well, the basic idea was that we didn't want to use Duke Oaks as our representative. Now, Abbott would be on the job. If Tope wanted Duke Oaks, that was his prerogative, but that would be extra cost to him, whereas he could have Abbott for nothing.

Q. Can you tell us whether or not he did accept the services of Abbott? A. Yes, he did.

Q. And did Abbott thereafter work under him?

A. That is right.

Q. Did Tope at any time thereafter tell you that he didn't want Abbott working for him?

A. Not that I remember.

Q. Now, sir, can you tell us in reference to which of these subcontractors in Alaska used their own tools and equipment on that particular job?

A. Well, they started their jobs—their own particular [600] jobs, with their own tools and equipment, but later on in the job every one of them borrowed a cat, or asked Mr. Oaks to bring a cat in, and as the job progressed, they were using additional equipment that was not their own.

Q. But up to that time, at the start of the job, each had their own equipment——

A. That is right.

Q. ——and tools?

A. Yes.

(Deposition of Roy S. Crawford.)

Q. Are there many tools used by them in this type of work? A. A fair amount.

Q. What does the equipment consist of? What type of equipment? A. Trucks and cats.

Q. Now, was any extra equipment brought in on the area where Tope was working?

A. Yes, there was some agreement about it. I don't know the details of it, but Oaks delivered a cat. He contacted Rodgers and Babler and got a cat and delivered it for Tope himself.

Q. Was there any other equipment that was brought in at this time than this one Rodgers and Babler cat?

A. Yes—you mean for Tope?

Q. Yes; if you recall? [601]

“A. Yes; there was some more equipment. I don't remember what all, but I know he ended up with enough cats to have two operations running along the line at one time.

Q. Prior to this extra equipment, how many locations was he able to work? A. One.

Q. You call these locations spreads, don't you?

A. Well, a spread means, like you would use the word fleet. It represents several pieces of equipment working together.

Q. So after he got the additional equipment he was able to run two spreads, is that right?

A. That is right.

Q. Now, do you know whether or not Tope was agreeable to having this extra equipment loaned to him, and using it?

(Deposition of Roy S. Crawford.)

A. Insofar as I know, he was agreeable.

Q. He never objected to it to you, did he?

A. No, I had nothing to do with the negotiations to bring the equipment in.

Q. But, as I understand your testimony, you do know he used it?

Mr. Nesbett: I object to that as leading.

Mr. Rohrback: Let me rephrase it. I think it is merely repetitious.

Q. Can you tell us whether or not Tope actually did use the [602] extra equipment? "A. Yes.

Q. Now, can you tell us whether or not the other subcontractors objected to the extra equipment loaned to them?

A. No, each one of them got extra equipment through Oaks' help.

Q. I would like to go back for one more question with reference to Exhibit D, which was previously identified, the letter of March 22, 1954. I wanted to ask you, Mr. Crawford, if under the date of March 22, 1954, you did not address a letter to the Stuart Construction Company at Dot Lake Lodge, Alaska, and actually deliver such a letter to them, which read as follows:

'Gentlemen: Since you have not complied with Article XVII of your subcontract, and the Oaks Construction Company letter of 27 February, 1954, with regard to furnishing performance and payment bonds for your clearing contract with this company, you are hereby notified that unless you secure and give notice to this Company that you

(Deposition of Roy S. Crawford.)

have secured these bonds by 26 March, 1954, the provisions of Article XV will be enforced and the Oaks Construction Company will take over your work and complete same at your cost and expense.'

Did you write such a letter, and deliver it personally?" [603]

The Court: That is the Exhibit D or E, something like that?

Mr. Dunn: Yes. Then you say, Mr. Nesbett, "Yes, I——

"A. Yes, I personally delivered it a day or two later than the date it bears.

Q. Now, with reference to the work that Stuart Construction Company was doing under its subcontract, do you recall a rocky area, and a discussion with Mr. Tope in reference to skipping that area or going around that area temporarily?

A. Well, that was the Yerrick Creek area, and we argued over the Yerrick Creek area because Tope wanted to by-pass it. I know I argued with him considerably because it is what we call a flood plain, and with the time limit that he had to finish the job, if he by-passed it he might never be able to get back into it until later in the summer, and, as a result, slow us down and slow the pipeline down, too.

Q. Now, what would have happened in that area with a thaw, a spring thaw?

A. It is an area where the water spreads over quite a distance of the pipeline right of way. It comes in at right angles and fans out, and if you

(Deposition of Roy S. Crawford.)

had to clear it in the summer time, it would be very difficult because of the water and the fact that the contractor would have quite a bit of difficulty having traction through [604] there.

“Q. Can you identify where this area is?

A. It is approximately four miles north of the first road crossing of the pipeline after you leave the Tok pumping station.

Q. Now, sir, can you tell us what did Mr. Tope initially want to do in reference to that area?

A. To by-pass it and get it later.

Q. Can you tell us whether or not you ordered him to do one or the other—in other words, not to by-pass it, or to by-pass it?

A. I don't think I could order him to do it, but I could certainly argue with him.

Q. What was the final decision? Did he by-pass it?
A. No, he went on through.

Q. Do you know whether anyone else who was an employee of Oaks Construction ordered him not to by-pass that area?
A. Oh, no.

Q. Can you tell us whether or not the decision to stay in that area and not by-pass it was Mr. Tope's decision?

A. Yes, it would have to be.

Q. Now, sir, can you tell us whether you at any time forced Mr. Tope to work in weather he thought was too cold for his machines?
A. No.

Q. Do you recall whether there was any discussion that you [605] had with Mr. Tope in reference to cold weather operation of the machines?

(Deposition of Roy S. Crawford.)

A. Carl Oaks sent some literature that I think was put out by the Caterpillar people on cold weather operation. He sent it to me, and I took it down and gave it to Tope. My recommendation, after looking at this pamphlet, was to not operate below 40 below zero. In other words, it was a recommendation to save his equipment.

Q. You say recommendation. Was there any order that you gave in reference to that?

A. No; you can't tell a man if he wants to work.

Q. Now, do you know whether anyone else who was in Oaks' employee gave any orders to Tope that he was to work or was not to work in reference to weather?

A. No.

Q. By your answer, "No," you mean no one did, to your knowledge?

A. No one did to my knowledge.

Q. Now, Mr. Crawford, I want to ask you if you have a recollection concerning a conversation that you would have had with a Mr. Bayless and Mr. Tope concerning a fuel oil bill?

A. Yes; either Bayless or Tope called me at Fairbanks—I think it was Tope—and told me that Bayless wouldn't give him any more fuel. So I called Mr. Oaks in Anchorage, and he told me to contact Bayless and tell him not to worry about Tope's fuel bill, and that Oaks [606] would stand behind it, and see that it was paid.

Q. Did you subsequently contact Mr. Bayless?

A. Yes, I went up to Tok Junction, where Bayless has his headquarters, and I personally con-

(Deposition of Roy S. Crawford.)

tacted him alone and told him that Oaks had told me to tell him that Oaks would stand behind the fuel bill.

Q. Now, can you identify when that was, approximately? A. It was about late February.

Q. Now, did you at that time or shortly thereafter have a conversation with Bayless and Tope together?

A. Yes, that same night, I believe it was, after work had shut down, Bayless and Tope and I were all in the Lodge, and the question of this fuel oil bill came up again. I have no idea how it started, but Tope talked over his estimate with me in conjunction with Bayless.

Q. By "estimate," what do you mean now?

A. What work he had accomplished; in other words, his total and what he could expect for his completion of work for this period of time, whenever it had recently ended.

Q. Can you tell us from your own definite knowledge how much money Mr. Tope would have coming at the time of this conversation?

A. I would have a knowledge of his gross payroll before anything had been taken out. I had no idea of his net.

Q. How would you know the gross? [607]

"A. Because I knew the footage he had completed within a certain period, and I also had knowledge of his unit foot price.

Q. He was paid per foot, wasn't he?

(Deposition of Roy S. Crawford.)

A. Yes; the footage times the unit price would give the gross.

Q. Now, why do you say you would have no knowledge of the net he would get?

A. I didn't keep books for him.

Q. Now, what was this conversation to your recollection with the three of you that night at the Lodge?

A. I think it was intended to make Bayless a little happier about his bill. I had already told him Oaks would guarantee it, and I think Tope just wanted me to tell him he had money coming.

Q. Were you present when any check for \$3,000 was given to Mr. Bayless?

A. No. I heard about it later in the sense that I heard about it later from Tope. The next morning at breakfast Tope told me he had given him a check, whereas the night before he had mentioned he didn't have any money in the bank, and that certainly stuck in my mind, why a man would give a check when he had no money to cover it.

Q. Did you at any time tell Tope or Bayless that Oaks would see that he was paid? [608]

"A. No, I only told Bayless his fuel bill would be paid.

Q. Did you at any time during this period tell Tope how much money he had coming, or when he would receive it—the net he actually had coming?

A. Tope and I might have figured out his gross, but, again, I didn't know what he had in deductions.

(Deposition of Roy S. Crawford.)

Q. Now, sir, were you present when Tope left the job? A. No.

Q. Do you remember when that was?

A. The date?

Q. Yes A. Not now.

Q. How did you hear about it?

A. Vince Abbott called me and told me that Tope had left.

Q. Do you know whether any of Mr. Tope's equipment was used after he left?

A. No; at that time I told Abbott to leave Tope's equipment alone, and, if possible, to park it off the highway, and to leave it alone. As far as I know, it was never touched again by any of the crew we had.

Q. How was the work of the subcontract then finished?

A. That was by bringing in more equipment that Mr. Oaks acquired. We set up our own crew and operated it.

Q. You were subpoenaed to be present at this deposition, were you not? [609]

"A. That is right."

Mr. Dunn: That brings us to the cross-examination, your Honor.

The Court: Is it a long cross-examination?

Mr. Nesbett: Well, it goes on from page 38 to 61.

The Court: We better suspend then, we can't finish it today. Very well, let the Court stand in recess until ten o'clock tomorrow morning.

(The Court then recessed until Friday, August 15, 1958, at ten o'clock a.m.) [610]

(Deposition of Roy S. Crawford.)

The Court: Good morning, Gentlemen of the Bar. Are you ready to proceed with the case on trial?

Mr. Nesbett: Yes, your Honor.

Mr. Dunn: Yes, your Honor. I believe, your Honor, we were reading the deposition of Mr. Roy S. Crawford.

The Court: Yes, you were.

Mr. Dunn: With your permission.

The Court: The direct examination has been concluded as I remember.

Mr. Dunn: This is cross-examination, your Honor.

The Court: Yes, sir. I take it since you are reading it, the deposition taken on behalf of the plaintiff, I am sure it was offered by the plaintiff.

Mr. Nesbett: No, your Honor. Just the other way around. This deposition was taken by the——

The Court: Oh, yes, by the defendant.

Mr. Nesbett: Cross-examination by me.

The Court: I see. You finished your direct examination in reading?

Mr. Dunn: Yes, sir.

The Court: Now you are reading your cross-examination?

Mr. Nesbett: Yes.

Mr. Dunn: Page 38. (Reading the deposition.)

(Deposition of Roy S. Crawford.)

Cross-Examination

“By Mr. Nesbett:

Q. Mr. Crawford, have you read the deposition of Mr. Oaks before [612] you testified today?

A. I read his deposition some time last spring, a year ago.

Q. Haven't you read it since then?

A. No.

Q. Did you read the deposition of Tope and Harlan? A. At that time?

Q. At that time?

A. I think it was in March or April.

Mr. Rohrback: Of 1957?

The Witness: Yes, 1957.

Q. Now, Mr. Crawford, do you recall what objection the union had to the hiring of Spot Harlan?

A. What objection they would have, or did have?

Q. Did have?

A. I don't know that they had an objection.

Q. Was the union asked to pass on Mr. Harlan as an employee of Oaks?

A. Eventually they cleared him, and he brought him down on the job, I know that. That is my personal opinion.

Q. Do you recall what objection the union had to Mr. Tope's hiring him in the first place?

A. Well, at the time I talked to Tope about Harlan, Tope wanted me to put him on the Oaks

(Deposition of Roy S. Crawford.)

payroll without a clearance from the union. That was the whole argument between Tope and me. [613]

“Q. And you refused to let him go on the Oaks payroll, is that right? A. That is it.

Q. And the reason being what?

A. Oaks was a member of the Associated General Contractors, and they have a Master Agreement with the union to hire through the hiring hall at the union.

Q. And did you talk with the union as to whether or not Harlan would be okay on your payroll?

A. Tope told me he didn't have a clearance.

Q. Did Harlan go to the union in Fairbanks and in a matter of a day or two after your first refusal get a clearance from the union?

A. He eventually got a clearance. Whether it was two or three days or a month, I don't remember. I know he was on the job.

Q. He actually wasn't put on the job until the three cats from the McLaughlin Brothers were brought down on that section, was he?

A. I think that makes sense.

Q. Did you have any conversation with Harlan about his being hired to work on Tope's section of the pipeline? A. I don't remember.

Q. Could you have had some conversation with him about it and have forgotten it? [614]

“A. It is very possible. Harlan was practically a permanent resident at Tok Lodge. He lived there,

(Deposition of Roy S. Crawford.)

and everyone stayed there when we were in the area.

Q. Do you recall having a conversation with Harlan to the effect that you couldn't okay his being hired because there was a brother-in-law or son-in-law of one of the Oaks who had to be hired, and was working at the pumping station in that area?

A. There was an Indian that was hired from a pumping station.

Q. Was his name Wesland, or something similar? A. I wouldn't know.

Q. Do you recall that name?

A. No, I recall a man from the pumping station, but I don't recall his name.

Q. Do you recall he was a relative of someone closely connected with Oaks?

A. I doubt it very much, due to the nationality.

Q. Do you recall anything in that respect?

A. No.

Q. Do you recall telling Harlan that he could not be hired because this employee at the pumping station had to be hired first?

A. I do not, but it is possible that we had a clearance—I mean I had gotten a clearance or Tope had gotten a clearance for this fellow, and, naturally, he would go on first if he had a [615] clearance.

“Q. Would you say Tope got the clearance for this native at the pumping station?

A. When I said I don't remember, it is because

(Deposition of Roy S. Crawford.)

all three of those fellows, McMahon and Schmidt and Tope, and Miller, possibly—some of them did. I don't know which ones did call in and ask me to go over to the union and get a man for them.

Q. It is a fact, isn't it, that you told Harlan that he couldn't be hired because this native had to be hired first?

A. I don't remember any conversation like that. The basic idea was that we had to work through the union. If the native had a clearance from the union, naturally, he would go first. Now, I do remember it clearly——

Q. Well, excuse me. You have answered the question. Did Tope ask that this native be hired, or do you recall?

A. I believe that Tope laid him off.

Q. Can you answer that question—did Tope ask that this native at the pumping station be hired?

A. Specifically by name, no.

Q. A native, though, was hired?

A. It was later.

Q. He was later fired for drinking on the job, or something?

A. For some reason. I don't recall.

Q. Harlan was not hired the first time Tope asked that he be hired, was he? [616]

"A. No.

Q. Did you tell Tope to get Harlan a clearance, and it would be all right—a clearance from the union?

(Deposition of Roy S. Crawford.)

A. It would be all right with the Oaks' payroll, yes, I could very well have told him.

Q. Did you tell him that?

A. I am certain I told him we couldn't put Harlan on the Oaks payroll because we didn't have a clearance from the union. We couldn't put him on the Oaks payroll without the union clearance.

Q. Why didn't you tell Oaks to have Harlan go up and get a clearance from the union and go to work?

A. You mean, tell Tope that?

Q. Yes, tell Harlan to get a clearance and go to work?

A. I wouldn't say that I did or didn't tell him that.

Q. Did you tell him that?

A. I don't know.

Q. Tope made another attempt to hire Harlan shortly after the first attempt, didn't he?

A. I only remember the fact that we talked about this one time. He wanted to put Harlan on the payroll, and he did put him on the job some period later.

Q. Getting back to the question: Tope did attempt to hire Harlan a second time shortly after this first attempt, did he not?

A. I don't know how Harlan got on the job. Is that what you mean? Harlan got on the job later. [617]

Q. Harlan did turn in some time cards to Oaks, didn't he, for work done?

A. When? The first time?

Q. Yes.

(Deposition of Roy S. Crawford.)

A. I thought he hadn't put Harlan on yet.

Q. Harlan was a good man around a cat, wasn't he?

A. Yes, a very good man.

Q. When Harlan finally came to work, he was employed at about the same time the three McLaughlin Brothers' cats came down, wasn't he?

A. That could well be.

Q. He was hired, then, at the insistence of McLaughlin, wasn't he?

A. I don't remember now. It is possible that he was, because he had been a McLaughlin employee.

Q. He had been working for them before, hadn't he?

A. Yes.

Q. As a matter of fact, McLaughlin's foreman or superintendent said he wouldn't allow the cats to go down in that area unless Harlan was looking out for them, didn't he, or something to that effect?

A. I had no part in the arrangement to move the cats down. I didn't know about that until it happened.

Q. When you first learned about Harlan, he had already started to work for Tope, hadn't he?

A. I just said I don't know the date he worked. [618]

“Q. Didn't you, as a matter of fact, find that he was working, and discharge him?

A. I couldn't discharge him.

Q. Didn't you then, as a matter of fact, find that he was working, and tell Tope that he couldn't get paid and he wouldn't get paid?

A. You mean payroll-wise?

(Deposition of Roy S. Crawford.)

Q. Yes.

A. I told him he couldn't be on the payroll. Now, whether the man was working or not, I don't remember. I was under the impression he hadn't even worked yet. Whether he had worked or not, I knew he didn't have a clearance, because that was the fundamental problem.

Q. Were you trying to prevent Tope from getting Harlan on the job to take care of the cats?

A. No.

Q. Why didn't you tell Tope, "Look, Tope, get this man cleared through the union, and he can stay on the job. Otherwise he can't."

Mr. Rohrback: We will object to the question as being repetitious and also arguing with the witness, as well as asking a hypothetical question on a state of facts.

(Question read.)

A. I could have very easily entered into such a conversation.

Q. Do you recall telling him anything similar to that? [619] A. No, I don't.

"Q. How did you get along with Tope on the job? A. Pretty good.

Q. You two did have some differences, though, didn't you? A. You mean on the job?

Q. Yes.

A. I don't think anything unusual; just the normal arguments over completion of work and phases of the work.

(Deposition of Roy S. Crawford.)

Q. Would you argue with him on occasions?

A. On interpretation of work to be done, but nothing—

Q. I am just asking you, did you argue with him on occasion about work?

A. I believe I did, yes.

Q. Was that concerning the manner in which the work was done, or clearances?

A. Yes; I am sure I did. I argued with him over conditions in his contract or what he was supposed to do. On thinking about it, I am sure quite a bit of it was based on the fact that we couldn't give payment for work as completed he felt was completed. That was the basis of the argument.

Q. He couldn't get payment for any of the work done, could he?

A. Well, he got payment, surely.

Q. Do you know that he ever got payment?

A. You mean money?

Q. Yes. [620]

“A. Oh, what he received in dollars and cents, I don't know. I had nothing to do with that.

Q. Do you know that he ever got any payment?

A. Dollars?

Q. Payments of money for work done?

A. I think of a payment as his progress. He admittedly had progress payments, but dollar payments—I don't know what he got.

Q. Did you have a fight with Tope on one occasion after he left the job?

(Deposition of Roy S. Crawford.)

A. Well (pause)——

Q. I just asked you if you had a fight with Tope on one occasion?

A. After he left the job; it was a rather one-sided fight.

Q. Was it rather one-sided? A. Yes.

Q. Did you have any fights with him before you left the job? A. No.

Q. Do you know whether Hager had any fights with him on the job?

A. You mean physical fights, or arguments?

Q. Physical fights.

A. I don't know of any.

Q. You had quite a bit of pipeline to inspect, didn't you? A. Six hundred miles.

Q. How often would you say it was that you got into Tope's area?

A. On an average of once a week, because at the time Tope was [621] there, we weren't working the whole six hundred miles.

“Q. How long would you stay on Tope's particular section, for example, when you would visit him? A. You mean how long I would stay?

Q. Yes, generally.

A. Oh, anywhere from two or three hours to a day.

Q. Did you talk with Tope very much on those occasions? A. I always visited him, yes.

Q. How long was Hager on that section, do you recall?

(Deposition of Roy S. Crawford.)

A. Well, percentage-wise, about half of the time that Tope was there.

Q. Was Hager under you directly as an employee of Oaks? A. Yes.

Q. Was Duke Oaks any relation to Mr. Carl Oaks? A. His brother.

Q. Was he a cat skinner by trade?

A. I never knew Duke Oaks before this job. He was a cat skinner on the job.

Q. Whose particular section was he working on?

A. He worked for Tope.

Q. He worked for Tope? A. Yes.

Q. And Tope wanted to put him in what position when you had this conversation in Fairbanks?

A. He wanted to put him on as foreman. [622]

Q. What?

A. He wanted to hire him as foreman.

Q. And the conversation in Fairbanks regarding that matter was between you and Noonan and Tope, is that right? A. Right.

Q. Was that approximately in the latter part of January, 1954, to the best of your recollection?

A. That would be a fair guess.

Q. Wasn't that the occasion when Noonan was up in the hotel room and you were with him, and Noonan was pretty well liquored up?

A. I don't remember.

Q. Didn't Tope come to town from his section on that occasion and he had to buy a couple of bottles of liquor for Oaks at his request?

A. Oaks?

(Deposition of Roy S. Crawford.)

Q. I mean, for Noonan?

A. For Noonan? I don't know if Noonan asked him to. The meeting was in Noonan's office or in his apartment in the building he was staying in.

Q. Noonan was in his apartment or hotel room drinking, and you were there with him when Tope came in, weren't you?

A. As far as drinking, I don't remember.

Q. Now, why were you sending Vince Abbott to the job to replace Hager?

A. Because Hager and Tope weren't getting along at all. [623]

“Q. And Tope, on the other hand, wanted to hire Duke Oaks, is that right?

A. He could hire Duke Oaks if he wanted to.

Q. He wanted to hire him, did he not, and Mr. Noonan objected?

A. I don't think he objected. He argued with him over the fact that it would cost Tope more money because we had to have a man on the job to represent us and flag line. By that I mean survey line, and Duke wasn't qualified to flag and survey line; so that meant he would have had Duke as foreman and we would have had to have a man on the job to locate line and flag it.

Q. Was it your thought that Vince Abbott could handle both jobs and save money?

A. Yes, he was experienced.

Q. And save money?

A. And save money, yes.

(Deposition of Roy S. Crawford.)

Q. Abbott, then, would act as Oaks' representative and likewise as Tope's foreman?

A. Yes, with the agreement of Tope.

Q. And the arrangement insisted on by Noonan was that Abbott be used in that capacity and that Duke Oaks not be used in that capacity, is that correct?

Mr. Rohrback: Excuse me, counsel. I don't understand what you mean by "that capacity." As I understand the testimony, Abbott was to have two capacities: one representing Oaks, and one working for Tope, if Tope desired. So I will have to object to the [624] form of the question. If you will explain by what you mean by "that capacity," because I don't understand—the words "that capacity" refer to two capacities.

Q. Noonan wouldn't agree to putting Duke Oaks on the payroll as Tope's foreman, isn't that right?

A. No, that is not right.

Q. Was Noonan agreeable to putting Duke Oaks on the Oaks payroll as Tope's foreman?

A. Was he agreeable? I am getting lost in the words here. Noonan had no objection to Duke Oaks' being foreman. Does that answer your question?

Q. Foreman for Tope?

A. Foreman for Tope.

Q. He had no objection whatsoever?

A. He might have argued with him as a matter of economy, yes. I am certain he did.

Q. Did Noonan consent that he be paid as foreman out of Oaks' payroll?

(Deposition of Roy S. Crawford.)

A. Well, the agreement between Oaks Construction Company and Tope did allow him to be his foreman. He could have anybody he wanted as foreman, and Oaks would be the fellow or not be the fellow to pay the salary checks.

Q. Didn't you testify in response to the questions on direct that Tope could have hired Duke Oaks as foreman if he wanted to, but that he would have had to pay him himself? [625]

"A. No, if I said that that was a misunderstanding.

Q. You didn't so testify?

A. I certainly didn't mean to say it, if I said it.

Q. Then Noonan's position was something like this, was it not: "If you want Duke Oaks as foreman, you can have him, but I recommend against it. I would rather have Vince Abbott do the job." Is that right?

A. As a matter of economy, yes, and as a recommendation.

Q. And Vince Abbott was to be the locator, the line locator for Oaks? A. Yes.

Q. And likewise handle the job as Tope's foreman, is that right?

A. He was offered to be used as Tope's foreman.

Q. Tope, however, wanted Duke Oaks as foreman, isn't that right?

A. Yes, in the initial stages he said he wanted Duke Oaks.

Q. The result of the conference was that Vince Abbott went down on the job, isn't that right?

(Deposition of Roy S. Crawford.)

A. Vince Abbott would have gone down on the job in any event.

Q. Just answer the question. The result of the conference was that Vince Abbott went on the job?

A. Vince Abbott was definitely going on the job before this meeting occurred as Oaks' representative.

Q. And he did go on the job as Oaks' representative, didn't he? A. Right.

Q. Did he also go on the job as Tope's foreman? [626]

"A. Yes. May I make a point clear? As Tope's foreman, he was working under Tope in that phase of the work. He wasn't a foreman over Tope.

Q. Did Tope himself, to your knowledge, ever hire anyone to work for him on that section?

A. When I arrived back in Alaska, he had his crew. I don't know what arrangement he had made. He had his basic crew.

Q. Do you recall anyone who composed that basic crew?

A. I know quite a few men who were on the job, but I can't think of their names. They were construction people.

Q. And is it your recollection that Tope hired them all himself?

A. I have no recollection of Tope hiring men; he got these men. I know that.

Q. Did he hire Duke Oaks to begin with, or do you know?

(Deposition of Roy S. Crawford.)

A. I don't remember when Oaks came on the job even. I think he came a little later.

Q. Did Tope ever fire anyone, to your knowledge?

A. I believe he fired the—well, I am not sure. I believe he fired the native from the pumping station.

Q. Do you recall approximately what month this argument between you and Tope occurred concerning his moving his operation to the other end of his section and working back?

A. It must have been at the tail end of January or possibly early February, because of the distance he had covered up to that time. [627]

“Q. He was in a pretty rocky area at that time, wasn't he? A. Rough terrain, yes.

Q. The temperatures were going well below forty degrees minus zero on many nights, weren't they?

A. Yes, it was an extremely cold winter.

Q. And on some occasions I believe it went as low as 65 below, didn't it, that year?

A. I don't remember 65, but I do remember 60.

Q. From your experience, there is quite a high breakage occurrence on metal operated in those temperatures, isn't there?

A. You have a problem, yes.

Q. Isn't it a fact that Tope wanted to move to Big Delta and work back on his section because of that rocky area and the high breakage that was occurring on his cats?

(Deposition of Roy S. Crawford.)

A. The only thing I remember now is that he wanted to move around or by-pass this Yerrick Creek area. Now, he may have come up with the proposition to go to Big Delta; I don't remember."

The Court: That is the area where the rocks were?

Mr. Nesbett: Yes, sir.

Mr. Dunn: I believe it is true, isn't it, that this rocky area generally is between Cathedral Bluffs and Yerrick Creek?

Mr. Nesbett: I concede it was right in the Cathedral Bluffs area. That is all I know about it for sure.

Mr. Dunn (Reading): "Q. He wanted to work from Delta back, didn't he, and then get the rocky area? [628]

"A. He could have.

Q. Wasn't that the matter that caused the argument between you?

A. The argument was over skipping Yerrick Creek—the Yerrick Creek area.

Q. Why did he want to skip the Yerrick Creek area? A. It was rough.

Q. It was rocky?

A. Yes, it was rather bumpy.

Q. He wanted to work back on that and get it later in the spring when the temperatures were higher, and there would be less breakage, didn't he?

A. That was his idea, and the argument was over the fact that he might not be able to get in there in the spring.

(Deposition of Roy S. Crawford.)

Q. Did you consider it unlikely that he could get back to that area before it thawed out?

A. There was a good possibility. Whatever plans he gave me at that time, I know, entered into it.

Q. Is it your testimony that Tope could have moved the operation to Big Delta and done it if he wanted to?

A. He could have moved. We didn't attempt to control where he moved to. We might argue about the possibilities in the area.

Q. And you did argue about it? A. Yes.

Q. And the result was that he didn't move, did he?

A. He stayed and went through Yerrick Creek. [629]

"Q. Mr. Crawford, did you terminate your employment with Oaks in 1954?

A. It was in the tail end of 1954, or the first of 1955.

Q. Have you worked for them since?

A. No.

Q. Are you an engineer by profession?

A. By training, yes.

Mr. Nesbett: That is all.

Mr. Rohrback: I have just a few questions.

(Deposition of Roy S. Crawford.)

Redirect Examination

By Mr. Rohrback:

Q. You mentioned that some of your arguments or discussions with Tope were concerned with whether he could get payment for the work done by him. What did you mean by that?

A. Well, I know at one time in an area somewhere near this Yerrick Creek portion that he had gone through and just piled up the debris in a pile, and the Army Engineers objected to it, and said we would have difficulty in getting payment for that type of clearing.

Q. Then what you have reference to is whether the work he was doing was acceptable to the Army Engineers?

A. Right.

Q. Now, you indicated at one time that when you used the word "payment," you meant progress for his work?

A. Yes. [630]

Q. In other words, how much he had completed satisfactorily?

A. That is right.

Q. Now, you left us kind of up in the air. You said the fight you had after Mr. Tope was off the job was a one-sided fight. Would you describe what you mean by "one-sided"?

A. Well, I hardly knew I was going to get hit, and after I got hit, I didn't know much; I had a matter of seconds to react.

Q. In other words, you were hit by Tope?

A. That is right.

(Deposition of Roy S. Crawford.)

Q. Then there was reference to a situation which would have happened if Tope had hired Duke Oaks as his foreman. You said that it would have been all right to carry him through Oaks' payroll, but that his wage would have been charged to Tope, is that correct? A. That is right.

Q. Whereas Abbott was being paid in full by Oaks to run the line, and you were merely donating his extra time to Tope? A. Right.

Q. But the decision of which to use was Tope's?
A. Yes.

Mr. Rohrbach: That is all."

Mr. Dunn: That is all redirect examination. Beg your pardon. Recross-examination by Mr. Nesbett on page 58: (Reading):

Recross-Examination

"Q. This argument over the quality of the work concerned, among other things, the berm that was to be tramped down to a specified [631] height?

"A. Yes, it is in the contract.

Q. One of the arguments, at least, occurred over Tope's desire to leave the berm until more of the snow had melted so that it could be tramped to the contract specification level; it would be easier then than to tramp it to that level with a lot of snow and low temperature, isn't that right?

A. There was an argument on how to tamp the berm down, and quite a bit of argument over whether it could be done better in the winter or wait

(Deposition of Roy S. Crawford.)

until later in the year, when you had matchsticks sticking up in the air.

Q. The Army inspectors, when they saw the high berm, were concerned or felt that maybe Tope felt that he had completed the clearing according to specifications—weren't they?

A. That would be the fundamental reason, yes.

Q. Tope's contention was that he wasted hours in cold weather and deep snow trying to tramp it down then when he could do it much faster after the snow had somewhat disappeared—wasn't that his contention?

A. That would be his contention.

Q. But the result of the whole argument or difference of opinion was that Tope had to go along and tramp it right at the time he cleared it, wasn't it?

A. If we had any hope of getting payment, yes.

Q. He wasn't permitted to wait until some of the snow had [632] melted and the tramping could be accomplished according to the way he thought it might be accomplished, was he?

"A. By "permitted," I don't understand.

Q. Well——

A. He made his own decisions.

Q. Well, he didn't do it the way he wanted to do it, did he?

A. The way he wanted to do it before the argument?

Q. Yes. He didn't do it that way, did he?

A. No."

(Deposition of Roy S. Crawford.)

Mr. Dunn: Redirect Examination by Mr. Rohrbach, at page 60.

Redirect Examination

“Q. The persons who had to be satisfied when you use that word were the Army Engineers?

A. In the end result, yes.

Mr. Nesbett: The end result was before final acceptance?

The Witness: Yes.”

Mr. Dunn: Your Honor, having read that, I'd like to offer it, please.

The Court: Very well.

Mr. Nesbett: No objection, your Honor.

The Court: Roy S. Crawford. That is Exhibit R.

Mr. Dunn: Your Honor, if I may call my next witness, I'd like to call Mr. Roy Lucas, please. I assume he is out there; he has been subpoenaed. Your Honor, while we are waiting for this witness, I made demand, if you recall, for the tax returns of [633] Mr. Tope and Stuart Construction Company, Inc., for the years 1953 and 1954, and I would like to have those produced, if I may.

The Court: Very well. Are they available?

Mr. Nesbett: I have given him the returns for '53 and '54 that Mr. Tope has furnished to me and they're——

The Court: For the corporation?

Mr. Nesbett: They are for Stuart E. Tope, your Honor, and I have asked him if there was any corporate return. Mr. Tope says that he doesn't know whether the accountant made a return on behalf of

the corporation or not. These returns do contain the income he received from Oaks Construction Company himself, however, the payroll slips.

The Court: All right.

ROY LUCAS,

being first duly sworn upon oath, deposes as follows:

Direct Examination

By Mr. Dunn:

Q. Will you state your name, please?

A. Roy Lucas.

Q. Where do you live, Mr. Lucas?

A. 3306 Wyoming Drive, Spenard.

Q. Mr. Lucas, are you acquainted with work that is commonly designated the Haines pipeline, and particularly with the clearing of right of way between roughly, between Big Delta and Tok Junction? [634]

A. I worked on it.

Q. Are you—then you are familiar with it?

A. Yes.

Q. You worked on that section between Big Delta and Tok Junction, is that right?

A. That's right.

Q. What did you do?

A. I was a heavy duty mechanic.

Q. Did you take care of the cats that Tope had on the job?

A. Yes.

Q. How long did you work on that section?

A. I can't give you the exact dates but I think they were from sometime the first part of February until the first part of May.

(Testimony of Roy Lucas.)

Q. Of what year, please? A. '54.

The Court: February until May, did you say?

A. Yes.

Q. Now, during that period of time, did you also have occasion to service any cats that belonged to McLaughlin? A. Yes.

Q. When you first came on the job, how many cats did Tope have? A. Three.

Q. How many of them were running?

A. The morning I got there, I think there was one running. [635]

Q. Well now, during the time that you were on the job how long did all three of those cats run at the same time?

A. Well, only part of one day did I have all of them running.

Q. And with the exception of part of one day, one or more of them was inoperative, is that correct? A. Yes.

Q. Well, how about McLaughlin cats? Compare the maintenance required with those cats with the maintenance required on Tope's cats?

A. It was a lot less.

Q. Did you have occasion to talk to Tope from time to time while you were on this job?

A. Yes.

Q. Did he voice any concern over completing this job? A. Yes.

Q. Was he concerned over getting it done on time? A. Yes, he was.

(Testimony of Roy Lucas.)

Q. Did he voice any concern over the expense of completing it? A. Yes.

Q. Was he concerned over it being expensive?

A. Yes.

Q. Well, how did Mr. Tope react to the services that you rendered?

A. As far as I know, Mr. Stuart and I always got along good.

Q. He received your services, accepted them, did he not? A. Yes. [636]

Q. Did he voice any opinion as to whether or not he was glad to have them or whether or not he re-ented them?

A. When he came to the job, Mr. Stuart told me that he was glad I came out.

Q. Did you hear Tope voice any opinion as to how he was going to come out on this job in the long run? A. No, I did not.

Mr. Nesbett: I object to that, your Honor, as the witness being entirely incompetent to answer; he was a mechanic working on the cats. He had not date, time laid or any other foundation.

The Court: He has already answered, but he would be competent to say what Mr. Tope had said to him about the job. That is what counsel asked him. Of course he can ask him to express an opinion about how he'd come out on the job and he couldn't answer. By saying "yes"; he expressed an opinion; he would have to say what he said.

Mr. Nesbett: The point I was making, your

(Testimony of Roy Lucas.)

Honor, a broad side statement, without any time, place or persons present.

The Court: You were right about that. However he said he did not, so that ends the matter.

Mr. Nesbett: Did he say that?

The Court: At least that is my recollection.

A. That is right. I said "no."

Q. Did Tope tell you that he was afraid he was going to lose a [637] lot of money on this job?

A. He was concerned over it, yes.

Q. Did he tell you that?

A. Well, we used to talk about the way the operation was going and the hard luck we were having.

Q. And did he voice his concern at that time?

A. He was afraid he wasn't going to come out.

Q. Did Mr. Tope give you any orders while you were on that job? A. Yes.

Q. Did he tell you how to fix his equipment?

A. No, he just told me the equipment that was down and I went to repair it.

Q. Did he tell you where to go and what to do?

A. He told me where the equipment was down. He never did tell me how to do it.

Q. But he would direct what equipment you would work on?

Mr. Nesbett: I object to the leading question, your Honor.

Mr. Dunn: It is leading.

The Court: Leading and calls for an opinion.

Q. Now, you testified, did you not——

(Testimony of Roy Lucas.)

Mr. Nesbett: I'll object to that, your Honor, on direct examination. That is cross-examination procedure but——

The Court: Counsel would have a right to refresh his memory about any matter that the testimony is pointing. You may do that. [638]

Q. You testified, did you not, that you were on this job from February to May? A. Yes.

Q. Were you working on Tope's cats periodically throughout that time? A. Yes.

Q. Did you get fairly well acquainted with them?

A. I didn't understand the question.

Q. Did you get fairly well acquainted with what condition, over-all condition those cats were in?

A. Yes.

Q. Do you know from what you observed of those cats whether or not they were in condition, proper condition for a winter job of this nature?

A. I think the cats were in as good a condition as they could have been.

Q. Well, what kind of condition were they in?

A. Well, when I got there, I would say they were in fair condition. The cats had worked before I got there.

Q. And they managed to run together one-half of a day, is that right?

A. That is right, that they all run.

Q. Do you think these cats could have handled that work if it would have been done in the summer-time?

A. They could have done it a lot better, yes. [639]

(Testimony of Roy Lucas.)

Mr. Dunn: No further questions, your Honor.

The Court: Mr. Nesbett.

Cross-Examination

By Mr. Nesbett:

Q. Who hired you, Mr. Lucas?

A. Carl Oaks.

Q. And did he send you down on the job?

A. Yes.

Q. Did you know Tope before you went down on the job?

A. Yes, but I hadn't known him very long.

Q. And did Mr. Oaks give you any instructions as to whether you were to take any orders from Tope before you went down?

A. I just understood that I was.

Q. Hired by Mr. Oaks? A. Yes.

Q. To go down and repair the cats of Tope, is that correct?

A. And stay there and maintain them.

Q. Now—that is all.

Redirect Examination

By Mr. Dunn.

Q. When Mr. Oaks hired you, did he tell you to report to anyone?

A. I wasn't to—just to report to the job, that I knew Vince Abbott was there in the capacity as supervisor.

Mr. Dunn: Will you read his answer back? I didn't quite catch it, please. [640]

(Testimony of Roy Lucas.)

A. I was just to report to the job and Vince Abbott was to be my supervisor.

Q. And did Oaks tell you to report to Tope?

A. I don't remember that.

Q. But he did tell you to go to Tope's spread, didn't he?

A. Yes. I was to report to that job.

Q. And Tope told you what work to do?

A. Yes.

Mr. Dunn: No further questions.

Recross-Examination

By Mr. Nesbett:

Q. Didn't you say that Tope told you where the cats were when they were down? A. Yes.

Q. He didn't tell you how to do your work, did he? A. No.

Q. Did he give you direct orders? Did he follow you around and tell you what to do and how to do it? A. No.

Mr. Nesbett: That's all.

Redirect Examination

By Mr. Dunn:

Q. Well, did you get the impression that Mr. Tope thought you knew enough to know how to fix these cats once he told you that they were down? [641]

A. I distinctly remember that Mr. Stuart told me that he was glad that I was there and he appre-

(Testimony of Roy Lucas.)

ciated what I was trying to do under the conditions we had.

Mr. Dunn: No further questions.

Mr. Nesbett: That's all.

The Court: That is all of this witness?

Mr. Dunn: Yes, sir. Your Honor, I have another witness that I asked to be here at 11:00 o'clock. I am interested in these tax returns. I wonder if I can call Mr. Tope as an adverse witness for the purpose of identifying these tax returns?

The Court: Yes, you may.

Mr. Dunn: I'd like to do so, please.

(Mr. Lucas left the witness stand. Mr. Tope resumed the witness stand.)

Mr. Dunn: The last witness may be permanently excused, may he, your Honor?

The Court: Yes, if you gentlemen wish.

Mr. Nesbett: Yes.

STUART E. TOPE

Direct Examination

By Mr. Dunn:

Q. Mr. Tope, you have already been sworn and testified in this entire matter, haven't you?

A. Yes, I have.

Q. Mr. Tope, did Stuart Construction Company, Inc., file a tax return for 1953 and 1954? [642]

A. We would have—I do not know but we would have to check with the accountant.

(Testimony of Stuart E. Tope.)

Q. Well, you would have signed it if it would have been prepared?

A. But I can't recall whether I did or I didn't.

Q. You heard me demand those tax returns. Did you not demand their production in this action?

A. I believe you asked my attorney.

Q. Well, you heard it, did you not?

A. I believe I did, yes.

Q. Well, did you look for those tax returns?

A. No, I didn't.

Q. Did you try to find them?

A. No, I didn't.

Q. Well, I repeat my demand for their production then, your Honor.

The Court: Who would have the copies, his counsel—find out where it is.

Q. Where would they be, Mr. Tope?

A. In Fairbanks.

Q. In Fairbanks? A. Yes.

Q. Does Stuart Construction Company maintain a business office in Fairbanks?

A. The accountant was in Fairbanks.

Q. Does Stuart Construction Company maintain a business office in Fairbanks? [643]

A. No, we do not.

Q. And you do not? A. And I do not.

The Court: What Mr. Nesbett said, the return made by Mr. Tope would cover the identical matters that could have been covered by the Construction Company.

Mr. Dunn: No, sir, he merely said that these re-

(Testimony of Stuart E. Tope.)

turns cover the income of Stuart, that Stuart Tope received from Oaks. That would be this drawing account or salary.

The Court: I see. Not all the income.

Mr. Nesbett: That was all the income there was to him.

The Court: I see.

Mr. Dunn: Yes. All that was reported.

Q. Mr. Tope, I hand you these two instruments and ask you if you can identify them?

A. Well, this is the withholding form from the Oaks Construction Company.

Q. Well, what is right under it?

A. And this is form 1040, U. S. individual income tax return.

Q. For what year please? A. 1954.

Q. For what person or persons?

A. Pardon.

Q. For what person or persons?

A. Stuart E. Tope. [644]

Q. And the—do you have another form 1040 there?

A. And here is the Alaska individual tax return for 1954.

Q. For the same person?

A. For the same person, yes.

Q. Do you have another form 1040 there?

A. This is an amended return copy. This is not a 1040 form—yes, sir, it is. Beg your pardon.

Q. You do have another form 1040, don't you?

A. Yes.

(Testimony of Stuart E. Tope.)

Q. For what year is that? A. '53.

Q. For what person? A. Pardon.

Q. For what person or persons?

A. Well, this is Stuart E. Tope and Bertha Tope.

Q. Now, Mr. Tope, I direct your attention to schedule D attached to the 1953 return, and ask you——

The Court: That is '53 or '54?

Mr. Dunn: '53, sir.

Q. ——and ask you if you see any reference there to the—I'll strike that. I beg your pardon, your Honor. It is Tope Construction Corporation. Is that some other corporation other than Stuart Construction Company? A. Yes.

Q. I just noticed that now. I am sorry. That doesn't have anything to do with Stuart Construction Company? [645] A. It does not.

Q. I withdraw the question. Mr. Tope, I invite your attention to Schedule D——

Mr. Dunn: Your Honor, I beg your pardon, I have wasted time. The reference is to Tope Construction Company, not Stuart Construction Company. I misread it. I have no questions of this witness.

Cross-Examination

By Mr. Nesbett:

Q. You were asked over a year ago in your deposition to make all the records of Stuart Construction Company available to Mr. Dunn, weren't you?

A. Yes, sir.

(Testimony of Stuart E. Tope.)

Q. You did that, didn't you?

A. To the best of my knowledge, yes, sir.

Q. You were not asked anything about an income tax return from the corporation as such until the commencement of this trial, were you?

A. No, I was not.

Q. Were all these financial statements and ledgers and so forth, that have gone into evidence concerning Stuart Construction Company, prepared by the accountant Marlor in Fairbanks?

A. That is correct.

Q. Then if you have no income tax report of Stuart Construction Company, as a corporation, in the records, you have, would they [646] be in the possession of Marlor to the best of your knowledge?

A. To the best of my knowledge, yes.

Mr. Nesbett: That's all.

The Court: Is that all of this witness?

Mr. Dunn: Yes, sir. No question.

The Court: Very well. Let the Court stand recessed for ten minutes.

(The Court recessed at 11:00 o'clock and reconvened at 11:10 o'clock.)

Mr. Dunn: I'd like to call Mr. James Beall, your Honor.

The Court: Would you give me the name again; James Beall.

Mr. Dunn: Yes, sir, Beall. B-e-a-l-l, I believe is the way he spells it.

JAMES W. BEALL,

being first duly sworn, upon oath, deposes as follows:

Direct Examination

By Mr. Dunn:

Q. Will you state your name, please?

A. Jim W. Beall.

Q. And where do you live, Mr. Beall?

A. 3908 Lois Drive, Spenard.

Q. Where do you work?

A. Spenard Plumbing.

Q. Lois Drive is where?

A. In Spenard. [647]

Q. Just adjacent to Anchorage? A. Yes.

Q. Mr. Beall, are you acquainted with the work of clearing the right of way on what is commonly known as the Haines pipeline, and particularly with that section between Big Delta and Tok Junction?

A. Not too acquainted with that section, no.

Q. How about the section immediately to the southeast of it, between Tok Junction and the Canadian border?

A. Yes.

Q. Are you acquainted with that? A. Yes.

Q. Was that McMann's section? A. Yes.

Q. Did you do any work on that section?

A. Yes.

Q. In the course of doing that work, did you have occasion from time to time to observe Mr. Tope here?

A. Just right at the beginning.

Q. At whose beginning, yours or his?

A. Well, we both started at the same point.

Q. And went in opposite directions?

(Testimony of James W. Beall.)

A. Yes.

Q. Well, did you see his equipment when he brought it on the job?

A. Shortly afterwards on the job. [648]

Q. What kind of shape was it in?

A. I wouldn't say very good shape.

Q. Was it new equipment or old equipment?

A. No, it is old.

Q. Did you observe any repairs to it that had to be made initially?

A. I didn't actually see them, no.

Q. Did you ever observe his cats at night?

A. You mean was I out there?

Q. Did you ever see his cats at night?

A. No, not particularly at night, no.

Q. Well, not particularly but at all did you ever observe his cats at night?

Q. Well, not out on the job, no.

Q. Well, any place?

A. Well, during the day I did.

Q. Did you ever see them at night any place?

A. Well, as far as being out there, no.

Q. Did you ever hear any of his cat skimmers make any comment about the condition of the equipment that they were operating?

Mr. Nesbett: I'll object to that, your Honor, as calling for hearsay.

The Court: Well, it would of course. The question is: Did he ever hear them make comment. He can answer that but he can't tell what they said. He can say whether he heard a comment but he

(Testimony of James W. Beall.)

can't say what the comment was, so it would be futile, I [649] suppose——

Mr. Dunn: I think that is argumentative, your Honor, really because the contention is, I take it, whether or not these people were Tope's employees or not.

The Court: Well, now, if he heard Mr. Tope make comment, now you know that that would be hearsay and the Court have it from someone else.

Mr. Dunn: But I would think if it was Tope's employees——

The Court: No, sir, they would not be competent or authorized to act for him and make any comments of that sort.

Mr. Dunn: I'll pass the question then.

Q. Did McMann's cats have very many breakdowns? A. No.

Q. How many cats did he have? A. Two.

Q. Was either of them ever down for as long as a full day? A. Yes.

Q. Were both of them ever down for as long as a full day? A. At the same time?

Q. No, during the course of the job?

A. One cat was down for a period of, oh, four to five days.

Q. With that exception, was either of those cats down as long as one day? A. No.

Q. Did you have any conversations with Mr. Tope? [650] A. I talked with him, yes.

Q. Did you ever hear Mr. Tope make any complaint about the work on his section of the pipeline?

(Testimony of James W. Beall.)

A. Yes.

Q. What did he complain about?

A. Of extra work that he had to do.

Q. Work over and beyond what?

A. It was extra work beyond his contract is all I know.

Q. Did you ever hear Mr. Tope make any boasts about his contract?

Mr. Nesbett: Your Honor, I will object to these general, broad questions, without him laying some foundation, where it was at least. It just calls for almost innuendo.

The Court: That, of course, would call for a conclusion as to whether he made a boast or not, that would be an opinion on the part of the witness. He can say what was said by Mr. Tope. However, counsel is right that there ought to be some time fixed when he made the statement.

Q. Well, with respect to the area of the Haines pipeline, between Big Delta and the Canadian border—well, here, I'll retract that. Where did these conversations that you had with Mr. Tope take place?

A. Tok Lodge.

Q. During what period of time? [651]

A. In the evening.

Q. During what months?

A. Well, it would be January.

Q. Of what year? A. 1953.

Q. Are you sure of that?

The Court: I think you can correct the witness.

A. January of '54. It was the winter of '53-'54.

(Testimony of James W. Beall.)

Q. And at that time, or during any of those conversations, did Mr. Tope ever make any statement to you about how long it would take him to complete his contract? A. No.

Q. Did he ever make any statement to you about how much money he expected to make under his contract?

A. I heard it but I—not at the particular time I am talking about.

Q. Beg your pardon.

A. I say I have heard the statement, yes.

Q. You have heard Tope make the statement?

A. Yes.

Q. Where? A. In the Lodge.

Q. During the same period of time?

A. No.

Q. When was—when did he make the statement? [652]

A. Well, it was in the evening just in the Lodge I have heard him make it.

Q. During what month?

A. Well, it would have to be during January.

Q. What did he say?

A. You mean the words he said, I heard him say?

Q. Yes. As best you remember.

A. Well, that he expected to finish the job soon and make some money on it.

Q. Do you have any connection with Carl Oaks at all? A. No.

Q. Where are you employed now?

A. Spenard Plumbing.

Mr. Dunn: No further questions.

(Testimony of James W. Beall.)

Cross-Examination

By Mr. Nesbett:

Q. Would those statements that you recall, Mr. Beall, have been made in the early part of January?

A. In January, yes.

Q. Would it be in the early part?—When did you start to work on your job, about the time Tope did?

A. Yes.

Q. That would—if I told you that the evidence here indicates that his work was started about January 3, would you say that that was approximately the time your spread started? [653]

A. Well, I was there before Christmas, but actually work didn't start until after the first of the year.

Q. Did you see Tope there before he started to work too? He was at the Lodge too, wasn't he?

A. Yes.

Q. And can you place the statements you may have heard or that you say you heard Tope make with respect to whether they were the latter part of December or early part of January?

A. I'd say early part of January.

Mr. Nesbett: No other questions.

Mr. Dunn: No questions, your Honor.

The Court: That is all.

(Mr. Beall left the witness stand.)

Mr. Dunn: Your Honor, we also have the deposition of Vincent H. Abbott, taken on behalf of the

defendants, on August 2, 1958, in Lathrop Wells, Nevada. I'd like to read that please.

The Court: Very well. August 2, that is quite recent.

Mr. Dunn: Yes, sir.

The Court: That is Vincent?

Mr. Dunn: Vincent, V-i-n-c-e-n-t H. Abbott, A-b-b-o-t-t.

The Court: Where was it taken? You told me but I didn't—

Mr. Dunn: At Lathrop (L-a-t-h-r-o-p) Wells, Nevada.

The Court: Thank you.

Mr. Dunn: Do you have a copy of this, Mr. Nesbett?

Mr. Nesbett: No. Your Honor, we weren't represented at [654] that deposition, and we have not gotten a copy. I was wondering if I—

The Court: Well, if there is one here, you sure can have it. Do you know whether there is a copy of it here?

Mr. Dunn: The original should be here, sir.

The Court: Oh, you have—you are reading from a copy?

Mr. Dunn: Yes.

The Court: If you are reading from a copy, let Mr. Nesbett have the original.

Deputy Clerk: If I can find it.

Mr. Dunn: Reading from page 2, the second paragraph, beginning at that page:

“Butcher & Dunn, Esqs., and Kahin, Carmody & Horswill, Esqs., appeared by Pinckney M. Rohr-

back, Esq., for and on behalf of defendants; there was no appearance for or on behalf of the plaintiffs.

Mr. Rohrback: This is the deposition of Vincent H. Abbott, being taken pursuant to notice of time and place, having been previously given, and taken at the Bongberg Cafe, Lathrop Wells, Nevada, commencing at 6:10 o'clock, p.m., on Saturday, August 2nd, 1958. I would like to further state that no attorney has appeared on behalf of the plaintiff at this deposition, nor have I, as attorney representing the defendants here at this deposition, been advised whether there will be any such representation or not. I arrived at the location for the taking of the deposition at [655] approximately five fifteen p.m. on this date and Mrs. Butterfield, the court reporter, advises me that she arrived very shortly prior to that time, and no attorney has arrived since that time up to the time of commencing this deposition to represent the plaintiff. We are therefore proceeding with the deposition, and I will state that this is the deposition of Vincent H. Abbott.

DEPOSITION OF VINCENT H. ABBOTT

Direct Examination

By Pinckney M. Rohrback, Esq.

Mr. Dunn: Beginning at page 3, Mr. Nesbett, will you be kind enough to read the answers.

"Q. Will you please state your full name?

A. Vincent Henry Abbott.

Q. And what is your address, Mr. Abbott.

A. Lathrop Wells, Nevada.

Q. You were subpoenaed to attend this deposi-

(Deposition of Vincent H. Abbott.)

tion as a witness were you not? A. Yes.

Q. Mr. Abbott, by whom are you employed here?

A. With I. L. Kroft and Son, Inc.

Q. What is their address?

A. It is Box 428, Newhall, California.

Q. Is there any likelihood that you will be in the Territory of Alaska, which now is the new 49th State, during the month of August, 1958?

A. Definitely not. [656]

“Q. And is there any possibility of your being up there even at any time during the rest of this year? A. No.

Q. Now, Mr. Abbott, were you ever employed by the Oaks Construction Company to work on the pipeline contract that company had between Haines and Fairbanks? A. I was.

Q. When did you arrive in Alaska for that job?

A. Well, I didn't go up for that job. I checked in at Anchorage, and Carl said he had a job at the pipeline for me, to check in with Roy Crawford.

Q. By 'Carl' you mean Carl Oaks?

A. Carl Oaks.

Q. Approximately when was this?

A. The dates are a little off. I would say it was around the 16th of February, something like that—I am not positive on the day.

Q. In other words, it could be off a day or two either way?

A. Yes, it could be off more than that as far as that is concerned.

Q. What year was that? A. It was 1954.

(Deposition of Vincent H. Abbott.)

Q. Now did you subsequently check in with Mr. Crawford? A. Yes, I did.

Q. And where was that? [657]

“A. Fairbanks, Alaska.

Q. And where were you sent, in reference to this pipeline job?

A. Well, I left Fairbanks, Alaska, to go to Scotty Creek. That would be the south section of the job that they had at the time. Actually, it was McMahon's section.

Q. I wanted to ask you, were you familiar, and are you familiar with the area from Haines to Fairbanks through which the pipeline was to run?

A. Very much so, yes. I have been all over all three sections of the job.

Q. You refer to sections, what were these sections consisting of, in reference to distances and locations?

A. I would have to have a map to check the stationing on them but from Northway to Fairbanks was split up in three sections.

Q. Let me interrupt; would you start at Fairbanks?

A. From Fairbanks to Tok Junction was Miller's contract.

Q. May I ask you, would it refresh your recollection if I suggested—wasn't it Fairbanks to Big Delta?

A. I mean Big Delta, yes—I am sorry. Big Delta to Tok Junction.

Q. And who had that section?

(Deposition of Vincent H. Abbott.)

A. Stuart Tope.

Q. Stuart Tope? A. Stuart Tope.

Q. And the next section was? [658]

“A. From Tope’s section to Northway, or right close to Northway, was McMahan.

Q. Can you describe these sections? Were they approximately the same size or was one bigger than the other?

A. In length they were the same size, but the terrain was different.

Q. Do you know approximately how long each section was?

A. It was approximately—to get me within even ten miles of that I would have to have a map, but they were very large sections. I would say Miller had roughly under one hundred miles; Tope had—I think they were all under, slightly under one hundred miles.

Q. Can you compare those sections, from your knowledge, in reference to terrain and the difficulty of doing the work that was to be done, which I understand was clearing work?

A. It was clearing, yes, all of it. Well, I had been over all three of the sections. McMahan had the most difficult section, due to the fact that it was steep ground. Tope had the easiest section due to the fact of the size of the timber and steep ground, rocky area; and Miller, I would say, had the second hardest section. I have been over all three sections myself.

Q. Now you—I interrupted you when you indi-

(Deposition of Vincent H. Abbott.)

cated that you had first gone to Scotty's Creek, which was on—whose section was it? Was it Miller's? [659]

“A. It was on McMahon's.

Q. Excuse me; on McMahon's. Where did you go from there? A. On Dot Lake.

Q. And on whose section was Dot Lake?

A. Dot Lake was on Stuart Tope's.

Q. How long was the time between going to Scotty's Creek and the time you went to Dot Lake?

A. I was in Scotty's Creek two days; I left Scotty's Creek around the evening—around four-thirty, and arrived at Dot Lake roughly around eight-thirty or nine-thirty, something like that.

Q. Of the same day?

A. Of the same day, yes.

Q. Did you have a meeting then with Mr. Tope?

A. No, Mr. Tope came in—I arrived in Dot Lake roughly around eight-thirty. Mr. Tope came in at around nine-thirty or ten o'clock and I talked with him until around one o'clock in the morning.

Q. Can you tell me when you arrived what Tope's reaction was to your being sent to Dot Lake?

A. Yes, I can; he seemed to be very happy about it. In fact he told me he requested me to come up there.

Q. Was that to work on his section with him?

A. That is correct, yes.

Q. Now what was your position there on that job in reference [660] to Oaks Construction Company? What were you to do for that company?

(Deposition of Vincent H. Abbott.)

“A. I was to represent Oaks Construction Company as an inspector and a representative for them; and to help Tope all I could, any way I could, to get his job done.

Q. Now, can you tell me from your experience on this type of job, is it customary or not for the prime contractor to have an inspector on these jobs overseeing the work of the subcontractor?

A. That is the regular procedure.

Q. Now——

A. You must have a representative, a prime contractor must have a representative on any jobs he leases out, to my knowledge.

Q. What does he do?

A. More or less inspects work; sees it is taken care of in the right procedure and to help the subcontractor in any way you can. That has been our method with Oaks Construction Company and previously, with other contractors, I have been in that position.

Q. Is the purpose of that inspector or representative of the prime contractor in any way to boss or control the subcontractor?

A. Not necessarily, no. He is merely out there to take care of the interests of the prime contractor plus help the [661] subcontractor if he needs any help.

“Q. And is that what you were there for?

A. Yes, that is correct.

Q. Could you give us your experience in refer-

(Deposition of Vincent H. Abbott.)

ence to this type of work Tope was doing on this pipeline?

A. Yes, I can. Not in the same country, but in Washington and Oregon.

Q. First, what work was Tope doing there?

A. Tope had the clearing between Tok Junction and Big Delta.

Q. Clearing for the pipeline?

A. Clearing for the pipeline, yes.

Q. And what did that consist of? How did he do that?

A. It consists of knocking down the trees with cats, putting them in a row and making a firebern; that is what it amounts to, you had two lines like that. You put all your debris in a firebern—knocked it down and put a firebern behind it so if a spark got into the pile of debris you had it wouldn't jump over the firebern and go over into the forest.

Q. That word is 'firebern'?

A. That is what I call it.

Q. What you mean is you take all the debris and all the timber and pile it up in one pile alongside the clearing?

A. In a windrow.

Q. That is all right. I am sure they will understand where the trial is being held. Would you give us then your experience [662] in this clearing type work?

“A. This type of clearing—I never did this type of clearing with a bern before.

Q. Well, what has been your experience for-

(Deposition of Vincent H. Abbott.)

merly then in operating the same type of equipment, and in road work?

A. Well, I have been operating it since—oh, since 1924.

Q. And have you also had experience in construction problems?

A. Yes, that includes construction. All of our construction includes clearing rubble and dirt, plus brush, rocks, shooting rocks, etc.

Q. And you have been in that business since 1924?

A. I have been in supervision since 1930, and previous, before that on my own.

Q. And have you also operated the type of equipment that they were using on those jobs?

A. Yes, I have. I have operated D-8, DW-20, DW-21; they don't make a piece of equipment I haven't operated, and if you want some of the companies' names I have worked for I would be glad to give them to you.

Q. Yes, that would be helpful; would you give us the name of the companies you have worked for?

A. Well, how far back do you want to go? Do you want to go back to 1924?

Q. Yes.

A. City of Los Angeles, San Francisquite Canyon Dam, 1924. This is not going to be all in rotation; it will be approximately [663] on the dates, that is for sure. Peshasta Lumber Company, 1924. Do you want supervision or do you want my previous experience?

(Deposition of Vincent H. Abbott.)

Q. Well, could you give me three or four where you have had experience operating equipment?

A. I have been operating equipment all my life. I don't know where to start. I don't know how far back to go. Well, it would be Max J. Kuhn and Company.

Q. How long were you with that company?

A. Roughly around twelve years; their address is 120 Lake Street, Spokane, Washington.

Q. Would you give us companies with whom you have had supervision work?

A. That was supervising work.

Q. That was supervising work?

A. Yes; previous to that I was with Peter Kewit,

Q. And how long were you with that company?

A. About six months.

Q. Was that also supervising? A. Yes.

Q. Had you worked for Oaks Construction Company prior to the pipeline job? A. Yes.

Q. And what job was that on?

A. Solano job, that was the Indian River; that is where they [664] started the job.

Q. And how long had you been on that job?

A. It was four months on that job.

Q. What was the nature of that job?

A. It was some new location plus widening and grade changes.

Q. Now then, to get back to your arrival in Alaska for the pipeline job, when you arrived at Dot Lake, can you tell us what equipment Stuart Tope had on that job?

(Deposition of Vincent H. Abbott.)

A. Yes, he had two D-8 cats; serial numbers—I can't—I think one was——

Q. We don't need serial numbers.

A. There was two D-8 cats.

Q. Did he have any other service type equipment?

A. Yes, he had one Dodge service truck.

Q. What is a Dodge service truck for?

A. A Dodge service truck is something that is in the performance of servicing equipment, hauling, diesel, and greasing, etc.; it is normally to take care of the equipment, to service the equipment is what it actually does.

Q. Did he have any car on the job to transport employees?

A. At the time I arrived on the job he had one GMC pickup; I think it was about a—it was an old one that he used himself. Oaks Construction Company furnished practically all of the transportation for Tope's men. [665]

“Q. Now, can you describe the condition of this equipment and what Tope was doing with it when you first arrived at Dot Lake?

A. Yes, when I arrived at Dot Lake it was very cold; too cold to work. He had two cats of his own; one rented cat was laid off, and I suggested it was too cold to work; it was about—40 VA.

Q. First, excuse me if I interrupt; what was this equipment doing?

A. When I arrived on the job it was sitting idling day and night.

(Deposition of Vincent H. Abbott.)

Q. Idling?

A. Yes, and had been for two or three days before I arrived on the job.

Q. What was the condition of the equipment from repair and workability?

A. The condition of the equipment was very poor, what we call very, very poor—everything was pretty well used up.

Q. Were you familiar with this equipment that was Tope's, that he had on the job?

A. Yes, I was. He did have two cats and one blade the previous year.

Q. Was that on this other job you referred to?

A. On the Solano job, or Indian River job. [666]

Q. What was the condition of this equipment of Mr. Tope on the Indian River job?

A. Very poor. I think our office should have the record of this equipment, the records, etc., at Anchorage, which would prove my word on it.

(Off the record discussion.)

Q. Now, when you arrived on the job can you tell me whether Mr. Tope had any mechanic on the job at that time? A. No.

Q. What was the purpose of a mechanic on a job of that kind?

A. A mechanic is to maintain the equipment when it breaks down and to take care of it and to service things and see that things are taken care of before it happens.

Q. Now, did you have any discussion with Mr.

(Deposition of Vincent H. Abbott.)

Tope in reference to what he should do on the job or in reference to the equipment?

A. Yes, I suggested that he shut his equipment down until it got down to at least thirty below zero before he tried to start them up, and do any work, and he agreed.

Q. And was the equipment shutdown then?

A. Yes, it was.

Q. Now, whose decision was that? Was that yours or his?

A. I can not make a decision when I am just merely working for the prime contractor. All I can do is suggest to him as a friend or whatever you may call it. [667]

“Q. I see. Can you tell me from your experience in this type of thing, is idling considered a proper way to handle and maintain equipment?

A. Absolutely not.

Q. What does idling during cold weather, when the equipment is not being used, do to the equipment?

A. Well, in the first place it breaks the oil down idling, and there is no motor to my knowledge that is made for idling, no diesel or gas motor, to my knowledge.

Q. Now, after the equipment was shut down was anything else done to it?

A. No, not until these—until we tried to start the stuff up again.

Q. And then what if anything was done?

A. Well, I don't think there was anything done

(Deposition of Vincent H. Abbott.)

to it until we started up. One of the oil pumps, when we started it up—they didn't make provision for the oil pump to have condensation and it broke shear pin in the oil pump, which I fixed myself, and other than that there was nothing done to the stuff unless it broke down.

Q. Can you tell me approximately how long Tope's equipment was shut down?

A. Well, offhand I would say roughly about two weeks.

Q. During that time was there any work on the job on Tope's section? [668]

"A. Well, Tope had a few of the skimmers working on the equipment, but like I say, I don't know what they did or nothing. They didn't do nothing, it was forty or fifty below zero; They didn't work on it. They didn't work; they turned in their time and didn't work.

Q. What is a skimmer?

A. It is an operator.

Q. Now, at the time you started to operate the equipment again—first was there any other equipment that was added to it?

A. Yes. Carl Oaks sent one cat in of his own, for the south end of the job, to go with Tope's one cat he had. I should go back and tell you why I suggested to Tope shutting his cats down. He left one idling that broke a connecting rod in it and kicked the starting motor off. That is why I suggested shutting down. That left him one cat of his own on the job after he started up, and Carl Oaks dropped

(Deposition of Vincent H. Abbott.)

one cat off. I can't think of the number of it, but he dropped this cat off on the south end of the job to help Tope's work. One cat is not enough on that type of job. You generally worked three in a clearing of that type and we added three cats of McLaughlin's.

Q. In reference to these three cats of McLaughlin, can you tell me whether or not Tope had anything to do with the negotiations to bring those cats into the job?

A. To my knowledge, he did. The negotiations for them, price, [669] etc., but Don Heck would not trust him with the cats; Don Heck put me directly responsible for the cats he rented.

Q. Who is Don Heck?

A. Don Heck is general superintendent of the job the cats came off of.

Q. He is McLaughlin's superintendent?

A. He is superintendent for McLaughlin, yes.

Q. Can you tell us whether you had any conversation with Don Heck and Mr. Tope prior to these cats coming on to the job in reference to the rental of those cats?

A. No. Maintenance is the only thing Don Heck held me to, not the money part of it.

Q. Who handled the arrangements in reference to the money?

A. Tope, to my knowledge. The only thing I was responsible for was maintenance and seeing the cats were taken care of; the money was out of my hands.

(Deposition of Vincent H. Abbott.)

Q. Can you tell me whether or not Mr. Tope helped you bring these cats on to the job?

A. Yes, he did. He helped move all three of the cats up and made arrangements for the lowboy to move.

Q. What is a lowboy?

A. That is a truck and trailer that hauls them, or, heavy hauler or whatever you want to call it.

Q. Now when this additional equipment came on the job can you tell us whether or not Tope was able to work in more than [670] one location at a time on his spread?

“A. Yes, he was. He was able to work in two locations at the same time on his spread. That was the purpose in getting the other machines in. He was so far behind in his contract he had to get help.

Q. Where did the McLaughlin cats work at?

A. McLaughlin's cats started roughly one mile north of the Halfway House.

Q. And where did the other equipment that was Tope's and this other Oaks' equipment work?

A. They were also working about fifteen miles south of Dot Lake, working north.

Q. Would they be working towards each other then?

A. No, not when they first started. McLaughlin's cats started a mile north of the Halfway House and was working towards Big Delta to get that section. That was the section that they had to have first because the pipeline was coming through from Fair-

(Deposition of Vincent H. Abbott.)

banks. But they did, when they completed that section, they came back and worked south.

Q. Now, do you know who decided on the job as to where each of these were to be worked?

A. Tope, to my knowledge. We talked it over between us, where to put the equipment, the procedure, the progress we had to make, that he had to make in order to complete the job—for that reason. [671]

“Q. I see. Now, can you tell me who had charge of what men would be operating equipment at one spread and what men would be operating equipment at the other spread?

A. Well, Tope was contractor on it; Allred run the north spread.

Q. Who hired Mr. Allred for that?

A. I think he was recommended to Tope through someone in Fairbanks. Who, I don't know. To my knowledge Tope hired him.

Q. And what was his job?

A. Foreman; he was clearing foreman.

Q. Now, how many cats did he have in his group? A. Three; McLaughlin's cats.

Q. Now, at that time, who was acting as foreman of the other spread?

A. There was no foreman at the other spread.

Q. And how many cats were operating at the other spread at that same time?

A. Two to start with; three later on.

Q. At any time did they get four on that lower spread?

(Deposition of Vincent H. Abbott.)

A. No; they had three. They had one of Babler's. I am sure it was one of Babler's because it came out of—I could be mistaken on that, but he had another between Big Delta and——

Q. All right. Where were you working during that time, if you were?

A. I was working on both ends of it, checking the lines, boundaries, etc. [672]

“Q. Did you run any of the equipment yourself?

A. At various times, yes, when we was short of men, in order to help Tope out.

Q. Did Tope, himself, run any of the equipment? A. No.

Q. What did—how did he occupy his time?

A. Mostly chasing parts, etc.

Q. Now, did you at any time you were on the job where Tope was doing his clearing, hire or fire any men that were working there? A. No.

Q. Do you know of any employee of Oaks Construction Company who did hire or fire any men on this area where Tope was working?

A. Not to my knowledge.

Q. Did you in any way boss Tope during that period or give him orders as to where he was to work or what he was to do?

A. Absolutely not.

Q. Do you know of any employee of Oaks Construction Company during that period you were there who did boss him or give him orders?

(Deposition of Vincent H. Abbott.)

A. No; because he was in charge of that area; he would be the only one who could.

Q. Can you tell us generally from your knowledge, during the time you were there, who made the decisions as to where to [673] work and how to conduct the work and what operators to use?

“A. Well, that was entirely up to Tope. He used to ask me whichever—he used to ask me what I thought of this fellow and that fellow. I have worked with most all of the boys who were on the job in previous years, and they were all pretty good hands we had there, except for a couple of them, but he knew all of the boys himself, so, therefore, he didn’t ask me where to put a man. He put a man where he wanted to put him.

Q. Do you know a man by the name of Wilcox?

A. Yes; I do.

Q. Did he work there?

A. He worked on the job, yes.

Q. Do you know who hired him or had him there? A. Tope.

Q. We have already mentioned Allred, haven’t we? A. Yes.

Q. Do you know a man by the name of Spot Harlan? A. Yes; I do.

Q. Do you know who hired him?

A. Tope hired him.

Q. Was Mr. Harlan working on the job when you arrived?

A. Not when I arrived. He was off; like I say, the equipment was off. When the equipment started

(Deposition of Vincent H. Abbott.)

back up and Tope got McLaughlin's cats he went back to work for Tope. [674]

“Q. Do you recall an instance of there being a jeep hired or rented from Spot Harlan on that job?

A. Yes; I do.

Q. And what was the need for having that jeep?

A. Transportation for them, for Tope's men. Tope wasn't available at the time. He took the station wagon, which is the only vehicle they had, and he told Spot to go ahead and use his private vehicle to haul the men back and forth to work and he would get paid for it, and the time was turned in to Oaks Construction Company.

Q. Do you know at that time whether or not the employees of Tope were being carried on Oaks' payroll?

A. Yes; they were.

Q. Do you know the purpose of that, or is that something that isn't in your field?

A. To my knowledge, I know Tope in the previous year didn't have the money to pack his own payroll.

Q. Were you on the job at the time Tope left the job?

A. Yes; I was.

Q. And what were you doing at that time?

A. I was still in the same capacity. I was in charge of inspecting the job, running lines, etc., seeing that the job went right.

Q. Do you know approximately when it was that he left the job?

A. Not the date, no. It would be some time in April, but not the day. [675]

(Deposition of Vincent H. Abbott.)

“Q. That would be April of the same year, 1954? A. Yes.

Q. Were you operating any of the equipment at the time?

A. The day that Tope left I was running his cat, running line, which the Army engineers had not given us the line through on a tangent; that would be north of Dot Lake. There was a tangent. Gene Katter, which was timekeeper for Oaks Construction Company and engineer, was running line through. In other words, we didn't have any stakes to go by, all we had was a tangent of the road and I was running the cat because we didn't have an operator.

Q. What again is the purpose of running this line? A. For boundaries and clearing.

Q. Now, did you have a discussion with Tope in reference to his leaving, as to why he was leaving?

A. Yes; I did. He said his lawyer told him to take all of his stuff and come to town.

Q. Now, what equipment did he take with him?

A. He took his service truck, station wagon and his pickup with him.

Q. Can you tell us whether or not he left any of the equipment that he had with the service truck you mentioned previously?

A. No, nothing. Absolutely nothing.

Q. Did he take his cats with him? [676]

“A. No; he left his one cat. His other cat was

(Deposition of Vincent H. Abbott.)

at Scotty Creek at the time—or, the motor of his cat was, I should say.

Q. Was Tope's cat used in any way on the job after he left?

A. No, sir; we couldn't start it.

Q. Can you tell us how the job was going at the time Tope left? A. It was going very good.

Q. Were two spreads still being run?

A. Yes; there was a two-cat spread and a three-cat spread. The three McLaughlin cats were still going, and the company's cat and Babler's cat were still going.

Q. Wasn't Tope's cat also going if you were actually operating it?

A. Just for the one day. I hadn't operated it for two or three days at the time I took it. It was just sitting. That is why I took it to run line with. The fact is it wasn't in working condition.

Q. Can you tell us whether the job was up to schedule? A. No; it was behind schedule.

Q. Was it catching up because of these two spreads?

A. It was impossible to catch up when I arrived on the job. It was impossible to catch up when I arrived on the job due to weather and the previous method of operation.

Q. Now, have you ever seen or been given a copy of the agreement or contract between the Stuart Construction Company [677] and Oaks Construction Company for Tope's clearing of this area?

A. Yes; I have.

(Deposition of Vincent H. Abbott.)

Q. And how did you get a copy of that contract?

A. I can't remember who gave it to me, whether it was Tope or Crawford.

Q. It would be one or the other of those?

A. It would be one or the other of those, yes.

Q. When would that be, in reference to your being on the job?

A. Roughly, it was about a month after I came on the job when they were trying to get Tope to sign a contract and be bonded on the job.

Q. Did you have any conversation with Tope with reference to the contract or bonding?

A. No. No; that wasn't my job; it was Roy Crawford's.

Q. How did you get along with Tope?

A. Swell, up until the day he left. The fact is, my wife brought him up in our car to tell me he was leaving. We had no hard feelings between us all the way through up until the time he left.

Q. Can you tell us whether or not you did everything you could to help him while you were on the job?

A. I did everything in my ability and knowledge to help him.

Q. Have you seen Mr. Tope since he left the job?

A. Yes; I have. I have seen him a couple of times, in Anchorage [678] the following year, and he wouldn't even speak to me.

(Deposition of Vincent H. Abbott.)

“Q. Was Mr. Allred in any way under you, so that you were his boss?

A. Well, that depends on how you want to state or word it. Tope wasn't on the job too much, and I lined him up how the job had to look when it was completed, on the clearing. I didn't tell him how to do it or nothing, just what the company expected when completed, plus helping him all I could with previous experience up and down the line, the method they were using on the clearing.

Mr. Rohrback: That is all the questions I have. We are concluding this deposition at 7:00 o'clock p.m., and no attorney has appeared representing the plaintiff at any time during the taking of this deposition, nor has the plaintiff. One or two more questions, Mr. Abbott.

Q. When was the subpoena served? Showing you the original subpoena, which the court reporter has marked Exhibit A, I want to ask you if this was exhibited to you and served upon you?

A. Yes; it was.

Q. And when and where?

A. It was served at my home on August 1st, 1958.

Q. And approximately what time?

A. Approximately 7:00 p.m.

Q. And you responded to this deposition pursuant to that subpoena? A. Yes.”

Mr. Dunn: Whereupon, the taking of the deposition was concluded. [679]

Mr. Dunn: Having read it, I'd like to offer it, your Honor.

Mr. Nesbett: We have no objection, your Honor.

The Court: Very well.

Deputy Clerk: Defendant's Exhibit S.

The Court: This case will be suspended until 12:00 o'clock and the Court will adjourn until 1:30, to take up another matter.

(Recessed at 12:00 noon; reconvened at 1:30.)

CARL E. OAKS

being first duly sworn, upon oath, deposes as follows:

Direct Examination

By Mr. Dunn:

Q. Will you state your name, please?

A. Carl E. Oaks.

Q. Are you one of the defendants in this action, Mr. Oaks?

A. I am.

Q. Do you know the other two defendants named, Butcher and Noonan?

A. I knew them. They are both deceased.

Q. They are both dead?

A. Right.

Q. Where do you live, Mr. Oaks?

A. Anchorage, Alaska.

Q. What relationship did you have with Oaks Construction Company?

A. I was a partner.

Q. You have been sitting throughout these proceedings, have you not? [680]

A. Yes, sir.

Q. And you are acquainted with the pipeline

(Testimony of Carl E. Oaks.)

and what part of it and so on that we are interested in, are you not? A. Yes, sir.

Q. Now, is Oaks Construction Company still in business? A. No, sir.

Q. What happened to it?

A. It went broke.

Q. Not in business now at all?

A. No, sir.

Q. What business are you now in, Mr. Oaks?

A. In the construction business.

Q. Are you in it for yourself or are you working for someone?

A. I am working for someone.

Q. Who are you working for?

A. Doddy Construction Company.

Q. How long have you been in the construction business? A. Since 1940.

Q. And you have done a good bit of contracting yourself, too, haven't you? A. I have.

Q. Now, will you explain to the Court what I think of as the chain of command with respect to this particular pipeline job. In other words, I want you to start with the prime contractor and go right on down to Mr. Tope, and tell the Court just how that was handled. [681]

A. This contract was awarded by the Corps of Engineers to the joint ventures of Williams, McLaughlin, Marwell.

Q. What did that contract call for, that prime contract?

(Testimony of Carl E. Oaks.)

A. That was to construct a pipeline from Haines, Alaska, to Fairbanks, Alaska.

Q. Well, now, was that for the complete construction?

A. That was for the complete construction.

Q. Complete installation of the pipeline?

A. Right.

Q. Go ahead. Excuse me for interrupting.

A. Williams Brothers subd from the joint venture of Williams, McLaughlin and Marwell the main pipeline. Oaks Construction Company subd from Williams the clearing and grading of the right of way.

Q. Well, let me interrupt you again. What did Williams Brothers sub from Williams, McLaughlin and Marwell?

A. The main pipeline, the construction of the actual pipeline.

Q. How much of it?

A. The entire pipeline.

Q. The entire six hundred miles?

A. Yes.

Q. And there was no difference in the work to be performed by Williams, McLaughlin and Marwell, and Williams Brothers, is that true?

A. Yes; there was. Williams just had the pipeline itself, and [682] Marwell had the building of all of the structures along the pipeline such as pump stations, the tank farms and such as that.

Q. Oh, I see, but Williams Brothers did sub-contract the entire line?

(Testimony of Carl E. Oaks.)

A. The actual pipeline, yes.

Q. Now, how many miles was that?

A. Approximately 600 miles.

Q. And then it in turn subcontracted to Oaks Construction Company? A. That is correct.

Q. How many miles?

A. 300 miles in Alaska, and 300 miles in Canada.

Q. Well, now, was that one subcontract or was that more than one?

A. That was two subcontracts.

Q. Was it—how much of it was in Alaska?

A. Approximately 300 miles.

Q. Was that all under one subcontract?

A. It was.

Q. All right. Let's forget about the Canadian section now. What duties did Oaks Construction Company have under its subcontract with Williams Brothers?

A. To clear and grade the right of way for the pipeline.

Q. The entire 300 miles? A. Right.

Q. And what did Oaks Construction Company do with the work it had to be done? [683]

A. Oaks Construction Company subd the clearing of the pipeline to three subcontractors and Oaks Construction Company done the grading themselves.

Q. Now, those three contractors, are those the three that have been mentioned here each of whom had about 100 miles? A. Yes, sir.

Q. But Oaks Construction Company retained

(Testimony of Carl E. Oaks.)

the grading? A. Right.

Q. You are familiar with plaintiff's Exhibit 1, the contract of December 17th, are you not?

A. Yes, sir.

Q. Did you help negotiate that contract?

A. I did.

Q. Did you ever waive any of the provisions of that contract?

Mr. Nesbett: I object to that, your Honor, as calling for a conclusion.

The Court: It would call for a conclusion but he can tell what he did and then we will have to say whether that was a waiver or not.

Q. What did you do, Mr. Oaks, with respect to the provisions of that contract once it was executed?

A. We went by the provisions of the contract.

Q. Are you acquainted with a bond provision in that contract? A. I am.

Q. Did you ever take any action with respect to the bond provision [684] in that contract?

A. We did.

Q. What did you do?

A. After we reached an agreement with Mr. Tope and Stuart Construction Company, for price and everything, he was to furnish a bond but he wanted to go to work but we said he could not go to work until he provided us with a bond. In the latter part of December of 1953 or thereabouts, I had a telephone call from Mr. William Olday, whom I knew. We had rented some equipment from him

(Testimony of Carl E. Oaks.)

from time to time, and Mr. Olday said that he was at the airport and he couldn't get in to see me; he was leaving for the states for over the Christmas holidays, but that he was going to help Mr. Tope, or get a bond for Stuart Construction Company.

Q. Well, now, had Tope gone to work at this time? A. He had not.

Q. Had Tope made any previous attempts to get a bond of which you knew?

A. I believe he had.

Q. Well, after Olday promised to get a bond for him, did he go to work? A. Yes; he did.

Q. Did he go to work before Olday so promised? A. No, sir.

Q. Well, did he get a bond? [685]

A. No, sir.

Q. Was any demand made on him for any bond after that? A. Yes; there was.

Q. Did he ever comply? A. No.

Q. Now, Mr. Oaks, I hand you this instrument and ask you if you can identify it?

A. Yes; I can.

Q. What is that?

A. It is the list of the mile post along the highway between Tok Junction and Big Delta at the various points along the job, roadhouses, creeks and so forth.

Q. Did you prepare that? A. I did.

Q. Did you see me give the original of that to the Judge to help him out? A. Yes, sir.

(Testimony of Carl E. Oaks.)

Q. Where did you get those mile posts? Where did they come from?

A. Off the mile post on the highway; either the mile post, and on every bridge the mile post is marked on the bridge.

Q. But those are the posts that are put up by the Road Commission, is that right? Those are not speed meter readings?

A. No; those are the mile posts on the highway.

Q. Do these mile posts and places, creeks and rivers, and so on, cover the section that Tope was working in? [686]

A. Yes.

Q. Do you know whether or not throughout that section that the pipeline fairly well parallels the road or not?

A. It pretty much parallels the road.

Q. There is some variation? A. There is.

Q. Now, you have heard reference, have you not, in this testimony to places like Tok Junction and Tok Lodge and Dot Lake and Yerrick Creek, places like that? A. Yes.

Q. Do you know whether or not those references refer to the highway or do they refer to the pipeline? A. They refer to the highway.

Q. The markings on the pipeline itself were of what nature?

A. They were designated in stations during construction. A station is a hundred lineal feet.

Q. Now, Mr. Oaks, did you place or cause to be placed along this pipeline supervisory personnel?

A. Yes; we did.

(Testimony of Carl E. Oaks.)

Q. Were some of those people Abbott and Crawford that has been testified about here for quite awhile? A. Yes.

Q. Well, what was there—were their duties—what was the duties of the supervisory personnel that you placed on this job?

A. Mr. Crawford was the General Superintendent. He had charge of [687] the work over the entire line. And then in each section of a line we placed another man to represent us in more or less a capacity of inspector and also to locate the clearing limits, so the subcontractor would know where to work.

Q. I ask you whether or not you know if the prime contract required that this pipeline be built according to certain specifications? A. It did.

Q. Did the contract that you—did the subcontract that you had from Williams Brothers require you to meet those same specifications?

A. Yes; it did.

Q. Did the subcontract that you gave Tope require him to meet the same specifications?

A. Yes.

Q. There was no difference there?

A. No.

Q. Well, what were those specifications generally, as best you remember them, with respect to clearing this right of way?

A. Generally speaking, the right of way was fifty feet wide. There had to be a thirty-foot cleared space for the pipeline itself. The remaining twenty

(Testimony of Carl E. Oaks.)

feet consisted of a five-foot fire break on the out and a berm of your cleared material.

Q. Were there any specifications as to how that berm was to be built? [688]

A. It was to be built——

Q. First, were there any specifications?

A. Yes; there was.

Q. What were they?

A. The berm was to be placed on one side of the right of way in a neat, orderly manner and compacted down.

Q. Well, did the specifications say how far it had to be compacted down or what do you mean by that? I don't understand you.

A. There was a reference in the specifications that was to be compacted down to no more than 18 inches in height, but that was never followed; it was just compacted down to whatever height that was practical.

Q. Now, did this subcontract that Oaks Construction Company gave Tope have a time limit in it?

The Court: Have a what?

Mr. Dunn: Have a time limit within which the work was to be completed, your Honor.

A. Yes; it did.

Q. What was that time limit?

A. 120 days.

Q. Was there any particular reason for specifying 120 days? A. Yes.

Q. What was that reason?

(Testimony of Carl E. Oaks.)

A. The reason was that we had to have the clearing done by early spring so that we could get our grading done ahead of the [689] pipeline laying crews.

Q. Who had a pipeline laying crew?

A. Williams Brothers.

Q. Well, now, was there a time limit in the subcontract you held under Williams Brothers?

A. Yes; there was.

Q. And each fellow had to get out of the other fellow's way, was that the size of it?

A. That is right.

Q. Well, do you know the practice in the construction business concerning the furnishing of men or equipment or both when a time limit on a subcontract is not being met? A. Yes.

Q. Was Tope meeting the time limit in his subcontract? A. No; he was not.

Q. Well, what is the practice?

A. If the general practice, if the subcontractor is not meeting his time limits or getting his work done properly, that the general contractor or whoever the subcontractor is subbing from, has to take steps to see that the work is completed as it should be and in the length of time it should be.

Q. Well, what kind of steps?

A. He has to see that he either gets—has to get more equipment, whatever that has to be done to get the job completed.

Q. Well, who pays for that equipment? [690]

A. The subcontractor.

(Testimony of Carl E. Oaks.)

Q. How is that handled?

A. It is handled numerous ways. Generally, the equipment is—if the subcontractor cannot get equipment himself the general contractor will have to get out and rustle equipment and get it on the job for him.

Q. Well, who pays for it?

A. The subcontractor.

Q. Well, how is the payment handled? That is what I am getting at.

A. Usually, the prime contractor will pay for it. If he has made the arrangements for the equipment, he has to pay for it.

Q. What does the prime contractor do after having paid for this equipment?

A. He deducts it from the earnings of the subcontracting——

Q. Is that called a back charge?

A. Right.

Q. Standard practice?

A. Yes; it is.

Q. Now, did you furnish any equipment or cause any equipment to be furnished for Tope?

A. Yes; we furnished equipment.

Q. Did you do it without consulting him?

A. No.

Q. How did you come to furnish equipment for Tope? What occasioned your furnishing him equipment? [691]

A. Through the chain of command, the way the general running of the office—word would get into

(Testimony of Carl E. Oaks.)

Anchorage usually that Tope would need—needed some equipment and then we would take steps to try to procure it for him.

Q. Do you know whether or not Tope requested additional equipment? A. Yes; he did.

Mr. Nesbett: What was that answer?

A. Yes.

Q. Did you hear Mr. Tope testify that \$25.00 an hour was a fair rental for a D-8 tractor?

A. Yes.

Q. From your knowledge of the construction business, what was the fair hourly rate for a D-8 tractor in 1954? A. \$18.50 an hour.

Q. Did you hire any cats in 1954 at that rate?

A. Yes; we did.

Q. Whose do you recall hiring if you recall any specific ones?

A. In particular, after McMahon had his portion of the pipeline cleared, we rented his tractors fully operated and maintained to help us with the grading, for \$18.50 an hour.

Q. Do you know what hourly rate is specified in the contract of December 17th, if any?

A. \$18.00 an hour.

Q. Did you negotiate that rate with Tope?

A. Yes; we did. [692]

Q. In 1954, to your knowledge, was \$25.00 an hour ever paid for a D-8 cat?

A. Yes; it was.

Q. Under what circumstances?

A. I believe in 1954, for just intermittent use,

(Testimony of Carl E. Oaks.)

for just short times, a day or two; the rate around Anchorage was \$25.00 an hour for a D-8 tractor fully operated and maintained, but on a job that lasted for any length of time, it was always considerable cheaper than that due to the fact that the machine worked every day and no lost time between jobs was the reason for the lower rate.

Q. The reason for the low rate was what?

A. There was no lost time between jobs if you had a long job; the machine worked every day.

Q. You mean moving the cat from one job to another?

A. Moving the cat from one job to another and also getting another job.

Q. I see. Do you know what the current rate—by current rate, I mean, now, in 1958 for a D-8 cat, is in this area?

A. Yes; however, that would depend on what—how old or what condition the tractor you were renting would be.

Q. Age hasn't something to do with the rent that is paid? A. Yes; it does.

Q. How does that affect the rent?

A. Well, a new piece of machinery will do more work and do it more [693] consistently than an old one.

Q. Then you pay for a new one? A. Yes.

Q. Were you acquainted with the equipment that Tope had? A. Somewhat.

Q. Did you hear Mr. Downs testify that it was used when he purchased it? A. I did.

(Testimony of Carl E. Oaks.)

Q. Did you ever have occasion to make use of that equipment prior to the pipeline job?

A. Yes; we did.

Q. You spoke of renting a cat fully operated and maintained, did you not? A. Yes, sir.

Q. Do you rent them any other way?

A. At times you rent a cat, what we call a bare rental; that is just the usual monthly rate and you—if a tractor is rented on a bare rental rate, the person renting it has to pay for all operational costs, parts, maintenance, operator wages; everything connected with—all expenses incurred in operating the tractor.

Q. Well, would you in the course of the construction business, do you ever rent a cat part bare and partly maintained, or is it one or the other?

A. The only other way that I have seen them rented is occasionally [694] a tractor will be rented operated or fully maintained, but the renter would pay the operator.

Q. Are those the only three ways that you have encountered in the construction business?

A. Yes, sir.

Q. May I have Exhibit 2, please. Mr. Oaks, I hand you Plaintiff's Exhibit 2 and I ask you if you are familiar with that? Have you examined that or a copy of it before? A. Yes; I have.

Q. You have studied the copy that I have in my office, haven't you? A. Yes, sir.

Q. Now, what provision is made on Exhibit 2 for maintenance?

(Testimony of Carl E. Oaks.)

A. The only maintenance I see is lubricating maintenance, \$10.98.

Q. Does the cat normally require any maintenance—did I cut you off? A. Yes; you did.

Q. I beg your pardon. Finish your answer.

A. That looks like \$10.98 per week.

Q. \$10.98 a week for lubricating maintenance?

A. Yes.

Q. According to your experience, in the construction business, and with cats, is that a reasonable figure?

A. I believe it is much too cheap.

Q. In your opinion, what would it cost to maintain the lubrication [695] normally on a cat?

A. The lube oil and greases themselves would run from \$2.00 to \$2.50 a day. That would be the minimum it would run, plus—

Q. For each cat?

A. For each cat, plus there has to be a man doing this servicing and equipment to service it with.

Q. Well, what would his wages run per cat per day? Now, I want your considered opinion on this. I don't want you to figure it out in the light most favorable to you, just as though you were not a party on this case.

A. I would say wages—that depends on how many tractors a man is servicing and everything, but a minimum should be about \$2.00 a day, and it would be more than that with just these three tractors operating.

(Testimony of Carl E. Oaks.)

Q. It would be \$2.00 a day wages for——

A. Each tractor.

Q. For each tractor? A. Yes.

Q. Well, now, in the ordinary course of a construction project, does a cat require any maintenance other than that reflected on Plaintiff's Exhibit 2?

A. Well, it needs mechanical maintenance.

Q. Of what nature?

A. Repairs that the machine normally needs and maintenance it needs to keep it operating. [696]

Q. Is any provision made for that on Exhibit 2?

A. I do not see any, no.

Q. Well, I invite your attention to the first page of that exhibit and ask you if any provision is made there for parts? A. Yes; there is.

Q. Give me Plaintiff's Exhibit 9, please. How much provision is made for parts there?

A. \$3,232.98.

The Court: \$3,000.00, how much?

A. \$3,292. I beg your pardon, your Honor, it is \$3,232.98.

Q. I now hand you Plaintiff's Exhibit 9 and ask you if you are familiar with that?

A. Yes; I am.

Q. That is the settlement you made with the NC Company, is it not? A. Yes, sir.

Q. Now, did that relate to Tope's cats?

A. Yes; it did.

Q. Under that settlement, how much did you pay NC Company for parts?

(Testimony of Carl E. Oaks.)

A. The figure here "open account," which I would take it to mean parts——

Q. Well, you heard Mr. Downs testify on that point, didn't you?

A. Yes; he said it was parts—was \$5,465.97.

Q. Well, from your experience, in the construction business, and from your familiarity with this particular project, do you have [697] any opinion to form as to the adequacy of the parts estimate allowed in Plaintiff's Exhibit 2, the \$3,000 odd dollar figure?

A. I don't believe it was enough.

Q. At any rate you paid NC Company \$5,000.00, didn't you? A. Yes, sir.

Q. Well, now, then, Mr. Oaks, excluding parts, what, in your opinion, would be required for maintenance other than lubricating maintenance on cats on this job?

A. There would have to be, I am sure, some additional costs such as welder time.

Q. What do you need a welder on a cat for?

A. There are always parts of a cat or bulldozer breaking that has to be welded.

Q. I see. Go ahead.

A. Also oxygen, acetylene, which is used for welding, cutting, and that would be about it.

Q. You need a mechanic, it is, or did you testify? A. And a mechanic.

Q. In addition to the mechanic you testified to?

A. Yes.

(Testimony of Carl E. Oaks.)

Q. How much would that amount to a day a cat?

A. Well, of course, the poor shape the machine is in, the more it takes.

Q. Well, let me put my question this way: You are familiar with Tope's cats, didn't you so [698] testify? A. Yes, sir.

Q. You are familiar with the area in which they operated? A. Yes.

Q. And you know the time of year in which they operated? A. Yes; I do.

Q. Well, now, considering those factors, how much do you think it would cost to maintain them other than lubricating maintenance?

A. I would say a fair estimate would be \$20.00 a day per tractor.

Q. \$20.00 a day per tractor. Well, now, awhile ago you told me \$15.00. Why have you boosted it five?

A. This was a winter operation which I don't believe I took into consideration then.

Q. Oh.

A. And also on those three tractors it would be dividing one mechanic's time against three tractors, too.

Q. Now, Mr. Oaks, I hand you Plaintiff's Exhibit 3 and ask you if you are familiar with that?

A. Yes, sir.

Q. Well, now, I call your attention first to the last three pages of it. Now that sets for the alleged operating time of Tope's cats, according to Tope,

(Testimony of Carl E. Oaks.)

isn't that right? A. Yes, sir.

Q. From your knowledge of the job, nature of the work, time of the year and so on, do you have any opinion as to the accuracy of this exhibit, those—insofar as this exhibit relates to [699] operating hours? A. I don't believe it does, no.

Q. Well, do you have any opinion as to the accuracy of the exhibit?

A. I don't believe it is accurate.

Q. —all right. Well, what do you base that opinion on?

A. Well, apparently this is—these hours that each tractor worked for each week are the same hours that the men that were operating them were paid.

Q. Well, could cats operate that regularly on that job at that time of the year?

A. Not that job nor any other job.

Q. I now invite your attention to the first page of that same exhibit, Plaintiff's Exhibit 3, and you will notice that on that he claims a reasonable rental for a 2½ ton Dodge truck of \$800.00 a month. Now—that is a service truck, isn't it? You know the piece of equipment?

A. I have heard here that it was a service truck.

Q. Well, would a service truck rental be more expensive than that of an ordinary 2½ ton Dodge truck or not? A. No; it wouldn't.

Q. It would be—would it be less or?

A. Would be the same as—

(Testimony of Carl E. Oaks.)

Q. Would be about the same? A. Right.

Q. Now, in the course of your 18 years in the construction business, [700] have you ever had occasion to rent similar equipment?

A. Yes; I have.

Q. And what can you rent it for?

A. Used to be able to rent a 2½ ton truck for between \$300 and \$350 per month.

Q. Would that be true in 1954? A. Yes.

Q. Would you get a new truck or an old beat up truck for that amount of money?

A. That should be a new truck.

Q. Now, have you ever had occasion to rent a Ford station wagon or a piece of comparable equipment? A. Yes; I have.

Q. What is the reasonable rental for that per month?

A. I would say \$125 to \$150 per month.

Q. Would that be true in 1954?

A. Yes, sir.

Q. Can you do that now?

A. May I answer this by what I am doing now? I am renting a 1957 Mercury Sedan right now for \$150 per month.

Q. Now, you notice the next item, ½ ton GMC pickup for \$250 a month. Have you ever rented any pickups? A. Yes; I have.

Q. What is a reasonable rental for those?

A. \$130 per month. [701]

(Testimony of Carl E. Oaks.)

Q. Is that an old one or new one?

A. That would be a good one.

Q. Do you happen to know what the condition of the one that Tope had for which he is claiming rental?

A. No; I don't.

Q. Now, you weren't on this line itself too much, were you, Mr. Oaks?

A. Very little.

Q. Altogether you had some 600 miles of line to take care of. Right?

A. No, sir; I didn't take care of 600 miles of line.

Q. How much did you have, or what did you do?

A. I was in Anchorage the greatest share of the time of this entire project was on the way. We had supervision on the pipeline. Roy Crawford was general superintendent, and one of the partners was on it all of the time. I was not.

Q. Did you ever have any trouble getting your money from Williams Brothers?

A. At one time, yes.

Q. What happened there?

A. The Northern Commercial Company filed against our monies and Williams Brothers withheld payment to us.

Q. Well, why did Northern Commercial Company do that?

A. It was in regard to the monies that Stuart Construction Company or Stuart Tope owed Northern Commercial Company. [702]

Q. Did that hold up your progress payments from Williams Brothers?

A. Yes; it did.

(Testimony of Carl E. Oaks.)

Q. Especially the 100 miles that Tope was working on? A. No, sir; the entire job.

Q. The entire project? A. That's right.

Q. Would that be—I am confused. Again, is that 300 miles or 600 miles? A. 600 miles.

Q. I don't understand that. Now, I thought they were under separate subcontracts?

A. They were, but, they, nonetheless, held up the estimates on both contracts.

Q. Did you compute it or aid in the computation of the bid that you gave Williams Brothers for the subcontract you got? A. Yes; I did.

Q. In the course of doing that, did you examine the terrain to which the bid related? A. Yes.

Q. Did you examine that part of it that is within the Territory of Alaska?

A. Yes; I did.

Q. How did you go about examining the Alaska part of it?

A. We drove over the highway and had the drawings, specifications with us, and compared the terrain to each—as you went [703] along with what it showed on the drawings.

Q. Well, did you learn enough to form any opinion—— A. Yes.

Q. As? A. Excuse me.

Q. As to the difficulty of clearing the various sections in Alaska? A. Yes.

Q. In your opinion, who had the hardest section?

(Testimony of Carl E. Oaks.)

A. I believe the hardest section was the section just south of Fairbanks.

Q. Would that be Miller? A. Yes, sir.

Q. Well, who had the easiest?

A. The easiest section was from Big Delta to Tok, Stuart Construction Company.

Q. The one covered by this contract of December 17th? A. Yes.

Q. Did you hear Mr. Hancock testify?

A. Yes.

Q. Did you hear what he said with respect to creditors of Stewart Construction Company making claim against Oaks Construction Company for payment? A. Yes.

Q. Was his testimony true or false? [704]

A. It was true.

Q. Did such creditors make claims?

A. Yes.

Q. How many, do you know?

A. No; I don't. They were numerous.

Q. They were numerous? A. Yes.

Q. Did Oaks Construction Company ever have to redo any of the work that Stuart Construction Company did? A. No.

Q. Never had to redo it?

A. Not particularly, no.

Q. Well, now, in Paragraph 10 of your counterclaim, Mr. Oaks, you asked damages for—well, strike that. I have over covered it. Did you hear the testimony about these two lawsuits up at Fairbanks? A. Yes; I did.

(Testimony of Carl E. Oaks.)

Q. Are those still pending? A. Yes.

Q. You still have to defend them?

A. Yes.

Q. Did Stuart Tope, or Stuart Construction Company, or any officer or director or employee, or any person in any way associated with one or both of them ever have any authority whatsoever to pledge the credit of Oaks Construction [705] Company? A. No.

Q. Have you ever had—have you ever worked—well, you have worked as a subcontractor, of course? A. Yes.

Q. Have you ever had your payroll carried the way you carried Tope? A. Yes; I have.

Q. Do you know how frequently that is done in a construction business?

A. It happens frequently.

Q. Excuse me, one minute, please. Do you know anything about Stuart Construction Company or Mr. Tope leaving this pipeline job?

A. Yes; I do.

Q. Did he leave? A. Yes.

Q. Was the job finished when he left?

A. No.

Q. Did he leave his equipment there?

A. No.

Q. Now, you have previously testified that you weren't on that job very much, that you were down here in Anchorage. How do you know he didn't leave his equipment there?

(Testimony of Carl E. Oaks.)

A. That is what I was told by our field personnel.

Q. Did you ever have any conversation with Mr. Tope concerning [706] any of his equipment on that job?

A. Yes; I did.

Q. What was that?

A. The day that I received word that he had left the job, I talked to him on the telephone and asked if we could make arrangements for him to leave his service truck there for us to use until we could procure another one, and he said "no," he would not leave it.

Q. He refused to leave it?

A. Yes.

Q. Was the job completed at that time?

A. No; it was not.

Mr. Dunn: I have no further questions, your Honor.

The Court: Would you—court will stand recessed until ten minutes.

(Court recess at 4:00 p.m.; reconvened at 4:10 p.m.)

The Court: Mr. Dunn.

Q. (By Mr. Dunn): Mr. Oaks, Paragraph 13 of your counterclaim you ask damages based on an audit of the entire job to be completed in the future with respect to the time your counterclaim was filed?

A. Yes.

Q. Was that audit ever completed?

A. No; it wasn't.

(Testimony of Carl E. Oaks.)

Q. Are you forced therefore to abandon that part of your counterclaim? [707]

A. Yes; we are.

Mr. Dunn: Thank you.

The Court: Very well. You may cross-examine.

Cross-Examination

By Mr. Nesbett:

Q. Did you say, Mr. Oaks, that Oaks Construction Company is broke now? A. Yes, sir.

Q. How long has it been insolvent?

A. Oaks Construction Company done the last business in 1955.

Q. Were you bonded for this work that you undertook to do on the pipeline? A. Yes.

Q. What was the name of your bonding company? A. American Associated.

Q. American——

A. At that time I believe it was American Automobile Insurance Company.

Q. And in what amount were you bonded, sir?

A. \$225,000.00.

Q. Was that for all three of the sections?

A. Yes.

Q. There are other lawsuits pending over this pipeline project, or the contract you undertook to perform, are there [708] not? A. Yes.

Q. Mr. Oaks, what rate per lineal foot did you take your contract for clearance and grading on this pipeline for?

(Testimony of Carl E. Oaks.)

A. Thirty cents per lineal foot.

Q. You were getting thirty cents per lineal foot? A. Yes.

Q. And what were you to see was done as far as your subcontract was concerned?

A. Would you repeat that, please?

Q. What were you to accomplish under your subcontract?

A. We were to do all the clearing, all of the grading.

Q. And were you supposed to burn any of the trash? A. Yes.

Q. Now, do you recall approximately when you first discussed with Mr. Tope the possibility of his going on a portion of the line?

A. I believe the first discussion we had with Mr. Tope was either late in November or early in December of 1953.

Q. And you had several discussions with him, did you not, before this contract of December 17th was finally signed? A. Yes.

Q. Did you first approach him from the point of view of leasing his cats for use on that line?

A. I believe there was some discussion at the very beginning [709] about some rental. I don't remember the circumstances.

Q. Mr. Tope didn't want to enter into any such arrangement on that basis, did he?

A. I believe he wanted to take the job on a contract basis.

Q. And now—may I see the Exhibit 1. I show

(Testimony of Carl E. Oaks.)

you Exhibit 1; that is the contract or a copy of the contract, is it not, that we are talking about in this case? A. Yes.

Q. Have you ever observed that paragraphs 4 to 11 or 10 are missing in that contract?

A. No.

Q. Would you look at Paragraph 4—pardon me, Paragraphs 4 to 9?

The Court: Inclusive?

Mr. Nesbett: To 9, your Honor. No; not inclusive.

The Court: That is between 4 and 9?

Mr. Nesbett: Yes, sir.

The Court: 5, 6, 7, and 8?

Mr. Nesbett: Yes, sir.

A. They are not here.

Q. Had you ever noticed that on any of the copies we used in depositions or pleadings in this case? A. No; I had not.

Mr. Dunn: Your Honor, I think I can, if Mr. Nesbett wants me to, supply the original. [710]

Mr. Nesbett: Well, I suggest that when I get through if he has those paragraphs, I would like to see them.

Mr. Dunn: I never noticed it either.

Q. Now, you had discussed the matter of bond, the possibility or probability of Mr. Tope being able to enter a bond, obtain a bond, before the contract and after it was signed? A. Yes.

Q. And Mr. Tope said he would try to get one, didn't he? A. Yes.

(Testimony of Carl E. Oaks.)

Q. He made several efforts around Anchorage to get one before he went up on the job, didn't he?

A. Yes; he did.

Q. And he was unsuccessful in those efforts, wasn't he? A. Yes.

Q. Mr. Olday did say that he might consider going on the bond after he came back from a trip outside, isn't that right?

A. Mr. Olday said he would go on the bond after he came back from a trip outside.

Q. He said positively that he would?

A. Yes, sir.

Q. Do you know why he didn't go on the bond before he went outside if he made such a promise?

A. Well, he talked to me on the telephone and he told me he was at the International Airport and he was leaving for outside at that time and as soon as he came back he would make [711] arrangements and would I let Tope go to work on his say so, that he would procure a bond.

Q. Did you discuss with Mr. Olday in that conversation that in the event Tope didn't get a bond that he could go ahead and do it on some hourly or rental basis? A. I did not.

Q. All right. When did Mr. Olday come back from his trip outside?

A. I believe it was the latter part of January.

Q. You recall testifying in response to questions on a deposition that it was about the middle of January? A. It could have been.

(Testimony of Carl E. Oaks.)

Q. Did you contact Mr. Olday or did he contact you concerning the bond?

A. I believe I contacted him.

Q. And did he tell you that he could not go the bond?

A. Yes; he did.

Q. Did he tell you that he had contacted an agency or two here in town and was warned away from the bond?

A. I don't recall the conversation just like that. There was some mention that he tried to get a bond, I believe.

Q. He did tell you definitely that he wouldn't go the bond, didn't he?

A. Yes.

Q. Did you tell him that there was a fee of \$3,000.00 in it if [712] he would go the bond?

A. No.

Q. If I told you that he had testified in a deposition that that offer had been made to him to go the bond, would you say that he was mistaken?

A. That I made the offer, or Oaks Construction Company made the offer?

Q. Yes. That the statement had been made by you that there was \$3,000.00 for him if he would go the bond. Would that be correct?

A. That we would—I don't understand you, Mr. Nesbett. I am sorry.

Q. If I told you that Mr. Olday had stated in a deposition that you had said to him, "There is \$3,000.00 in it if you will go the bond," would you say that he was incorrect or mistaken?

A. Yes.

(Testimony of Carl E. Oaks.)

Q. No such statement was ever made?

A. No.

Q. But he did say that he wasn't going to go the bond, didn't he? A. Yes.

Q. And that would be approximately in the middle of January?

A. Some time around there. It was after the middle of January.

Q. Mr. Tope was up on the job, wasn't he? [713]

A. Yes.

Q. Now, you had previously told Mr. Tope that he couldn't go on the job at all unless there was a bond, hadn't you? A. I had.

Q. But you let him go on, nevertheless, on Olday's promise, is that right?

A. That is right.

Q. Now, after Olday had said that he would not go the bond, you didn't write Tope any letters or tell him to get off the job, did you?

A. No; we didn't.

Q. Now, when were you awarded your subcontract by Williams Brothers, Mr. Oaks, approximately? A. November of 1953.

Q. And had you driven along the highway and inspected as much of the area as possible just prior to being awarded the contract?

A. We had driven over it prior to bidding on it.

Q. Approximately when did you drive over it?

A. In September of 1953.

Q. Did you fly over it or drive?

A. Drove over.

(Testimony of Carl E. Oaks.)

Q. Well, there was no snow on the ground at that time, was there, or very little?

A. There was snow in spots but very little. [714]

Q. Very little. Now, when you testified that in your opinion, after looking it over, Tope's section was the easiest section to clear, was your estimate of the ease or ability to clear the given section as based on the nature of the terrain, whether it was steep, hillside, timber covered, brush or what factors influenced you?

A. There was many factors that would enter into it. The roughness of the terrain, the heaviness of the timber, the—it was rough, rocky areas, how steep the hillsides were, just the general, everything you would have to look at to figure on bidding a job like that.

Q. Generally speaking in sizing up an area with respect to the ease of clearing it, the amount of timber that is on there is really one of the big factors, isn't it?

A. Yes; it is.

Q. And in making your—in reaching a decision that Tope's section would be the easiest to clear, did you bear in mind that the area that contained lots of rock would be snowed over level with the rocks in the wintertime when the tractors were attempting to operate in that area?

A. Yes.

Q. You looked forward and saw that contingency, did you?

A. Yes.

Q. You knew that would be difficult?

A. Each section had like areas. [715]

Q. And you knew then that that would be dif-

(Testimony of Carl E. Oaks.)

icult but nevertheless you still felt that Tope's section was the easiest? A. Yes, sir.

Q. Now, I believe you said you were only on Tope's section possibly two or three times during the entire job? A. Yes.

Q. Did you hire the McLaughlin cats that went over to work on his section?

A. No. I personally didn't hire them, no.

Q. Did you make the preliminary arrangements for them? A. No.

Q. Who did do that, Tope?

A. I think Mr. Tope had tried to get the tractors.

Q. What do you know about the renting or leasing of those cats to go over to Tope's section?

A. Beg your pardon.

Q. What do you know about the arrangements that led up to the use of those cats on Tope's section?

A. It was very apparent that there had to be more tractors. Mr. Tope had tried to rent them from McLaughlin and they would not rent them to him. And I believe it was Jerry Noonan and Mr. Crawford—

Q. Jerry Noonan and who?

A. Mr. Crawford initially talked to somebody in McLaughlin Company about them, seeing if they could get them—rent them to [716] put on this job.

Q. Jerry Noonan and Crawford made the final arrangements? A. I believe so.

Q. Don't you know?

(Testimony of Carl E. Oaks.)

A. I was not there.

Q. Well, weren't you directing the operation in general here from Anchorage?

A. Just the over-all picture, yes, but I wasn't in on any of those details.

Q. And you had nothing to do with it, actually, directly at all, is that correct?

A. Not with the McLaughlin's cats.

Q. Did you have anything to do with the Rogers-Babler cat that went on the job?

A. Yes; I did.

Q. And what did you have to do with that arrangement?

A. I made arrangements to rent it.

Q. With whom?

A. Howard McInroy, I believe.

Q. Who? A. Howard McInroy.

Q. Is he here in Anchorage?

A. No; not now.

Q. Well, he was at that time, was he?

A. Yes. [717]

Q. And where was the caterpillar?

A. In Anchorage.

Q. Did you make the arrangements that caused it to be transferred up to Tope's section?

A. I did.

Q. Now, did you hire Mr. Abbott?

A. Yes.

Q. Did you hire Mr. Wilcox, one of the cat operators that started out on Mr. Tope's cats?

A. No.

(Testimony of Carl E. Oaks.)

Q. You had nothing to do with that?

A. No.

Q. Do you know who hired him?

A. Mr. Tope.

Q. Mr. Tope hired him. Did you have anything to do with hiring any of the men that went out on his cats when the job first started?

A. Yes, I did. There were several men that had worked for us during the summer of 1953 that Mr. Tope said he would like to have on his job and we just made arrangements with the men to go to work for Mr. Tope.

Q. You made arrangements?

A. At Mr. Tope's request.

Q. Well, did he tell you that "I want some of your men to go on my cats"?

A. Yes, sir. [718]

Q. And you said "All right. I will let you have some of the men."

A. The men were not working for us at that time. Possibly got ahold of the men and told them that Mr. Tope wanted them.

Q. Well, why did Tope have to check with you if the men were not working for you at the time?

A. He didn't have to.

Q. He just did it any way?

A. That is right.

Q. As a matter of courtesy?

A. I imagine.

Q. Did you hire this fellow Lucas who testified here today?

A. Yes, I did.

(Testimony of Carl E. Oaks.)

Q. Where did you hire him?

A. In Anchorage.

Q. Did you send him up on the job?

A. Yes.

Q. Did you tell him to report to Vincent Abbott?

A. I believe I told him to report to the job; I don't recall making any reference to Mr. Abbott.

Q. Now, at the time Tope went up on the job you had told him you would carry all his payrolls, hadn't you? A. Yes.

Q. And did you tell him that—Did you ever discuss the matter of insurance, workmen's compensation, and so on? [719]

A. If we were going to carry his payroll, we would have to in the normal course of business carry the payroll, payroll taxes and insurance.

Q. You did carry them, didn't you?

A. Yes.

Q. And did you guarantee his fuel bills for his cats? A. Yes, we did.

Q. He told you he had no money?

A. Yes.

Q. You knew he went up on the job broke?

A. We advanced him money to go to work.

Q. Now, do you recall approximately when you hired the Rogers-Babler cat?

A. In February, 1954.

Q. February of '54. And do you know when the McLaughlin cats went on the job?

A. Around the first of March.

(Testimony of Carl E. Oaks.)

Q. Of 1954? Now, I believe you wrote or caused to be written a letter to Stuart Construction Company in April, about April 16 of 1954, did you not, advising him that you were taking over under Paragraph 17 of the contract? A. Yes.

Q. Do you recall that letter?

A. Yes, I do.

Q. Exhibit 6 in this case? [720]

A. Yes.

Q. At the time that letter was written, the Rogers-Babler cat was on the job, was it?

A. Yes, it was.

Q. And the McLaughlin cats were on the job?

A. Yes.

Q. And Lucas was on the job? A. Yes.

Q. Prior to this pipeline clearance job and in the late summer and fall of 1953 you had had occasion to use one or two of Mr. Tope's cats, hadn't you? A. Yes, we had.

Q. The same cats that went up on this pipeline clearing job? A. Yes.

Q. You used one of them on the Solano job, didn't you? A. Yes.

Q. You leased that from him at what you described as a bare rental arrangement, didn't you?

A. Yes, we did.

Q. That is where you just take the cat over yourself and put it on the job and furnish your own driver and fuel oil and maintenance and so forth and pay him so much per month, is that right?

A. That's right.

(Testimony of Carl E. Oaks.)

Q. For the month of August 1 to August 31 of 1953, you paid him [721] \$2500 per month under that arrangement for a D-8, didn't you?

A. I couldn't remember.

Q. You couldn't remember? A. No.

Q. Would that sound about right for a D-8 on a bare rental?

A. I would say at that time it was about \$500 too high. I think if I—my memory doesn't fail me, a D-8 bare rental at that time, rented for about \$1,995.00

Q. Bare?

A. That included the dozer power control unit, but unoperated and maintained.

Q. And that would be for a season of summer operation? A. Yes, sir.

Q. Now, ordinarily even on a bare rental arrangement, if the owner of the cat who contemplates renting it on bare rental knows that it is going into an area such as the pipeline clearance job, was in the midwinter, wouldn't there be a premium charge made for the weather and so forth? A. No.

Q. There would not? A. No.

Q. That's not customary in the business?

A. No.

Q. Would rental rates in the winter be the same as in the [722] summer? A. Yes.

Q. Now, I believe you examined Exhibit 2, Mr. Oaks, which is a cost of operations analysis sub-

(Testimony of Carl E. Oaks.)

mitted by Mr. Tope here as evidence, and stated that in your opinion——

A. Exhibit 2 is that?

Q. Exhibit 2, sir. Have you got it. And stated, did you not, in your opinion that for example, the item shown as lubrication and maintenance, \$10.98, was inadequate and insufficient?

A. \$10.98 per week, yes.

Q. Did you—Have you examined the explanatory item at the bottom of the page as to how that figure was arrived at?

A. Yes, I have.

Q. Number 4, I believe—Excuse me. Number 5?

A. Yes, I have.

Q. Do you still feel that an item of \$10.98 per week is insufficient?

A. Yes, I do.

Q. Do you have any criticism, Mr. Oaks, of the \$27.00 per week for prestone and miscellaneous lubricants?

A. No, sir.

Q. Or with the oil or fuel oil consumption figures?

A. No, sir.

Q. And payroll, of course not. Now, have you, yourself, set out and prepared something that might assist the Court in [723] getting a picture of what you think would be the normal operating costs under a similar situation?

A. No, we have not.

Q. Well, Mr. Oaks, referring again to the Solano job and the leasing of Mr. Tope's cat, you don't recall the bare rental rate you agreed to pay him on that job, do you?

A. No, I do not.

(Testimony of Carl E. Oaks.)

Q. Are you sure that it was not \$2,500 per month?

A. No, I am not sure it wasn't. If I may, I think I can make that easier for you, Mr. Nesbett. Thinking about it I believe we did pay Mr. Tope more than what the normal monthly rental would have been but he was to furnish all repair parts for his tractors.

Q. Well, you agreed to pay him, didn't you—wasn't there—didn't he render you a statement from August 1 covering August 1-31 for items—

A. I don't recall; he no doubt did render a statement but I don't recall.

Q. Well, if he rendered one to you in the sum of \$2,500, would it be your testimony that that would cover any of the parts that had to be furnished?

A. I believe that was the arrangement on that job.

Q. Now—

A. I do know he brought parts up to that job himself for his tractors. [724]

Q. Mr. Oaks, I believe you compared Plaintiff's Exhibit 2, which is the cost of operation analysis with Exhibit 9, which is a copy of the settlement you made with Northern Commercial Company, and noted the difference in the total sum allowed for parts used on this pipeline clearing? A. Yes.

Q. Exhibit 2 showing \$3,232.98 and Exhibit 8 showing that you had agreed to pay Northern Commercial Company \$5,465.97.

Mr. Dunn: Your Honor, I have to object to that

(Testimony of Carl E. Oaks.)

question because it is misleading. The \$5,000 figure the witness did not testify and there is no contention referred to total parts on the pipeline. It referred to monies paid NC Company for these three cats, the same three cats that are on Exhibit 2. It is not total parts.

The Court: Is that your recollection?

Mr. Nesbett: I hadn't asked the question. I was making a preliminary statement as to what I thought his testimony was. He said "Yes, I did"——

The Court: The witness can answer according to his recollection.

Q. Now, did anyone in Northern Commercial Company explain to you, or were you aware of how they had arrived at the total of \$5,465.97, as being parts furnished to Tope on that job?

A. That is what they told us it was.

Q. The total of parts furnished? [725]

A. Yes, sir.

Q. I believe you testified, did you not, that in your experience operating up in that area under those conditions, \$3,232 would not be enough to cover the parts used, is that right?

A. Not on those tractors.

Q. What do you figure, based on your experience, the cost of parts for those tractors would be under those conditions?

Mr. Dunn: Well, your Honor, the best evidence is already in.

(Testimony of Carl E. Oaks.)

The Court: Well, he is asking this witness if he has——

Mr. Nesbett: I will object to being interrupted. I am asking the witness' opinion.

The Court: Yes.

A. Well, I know that it was \$5,000 some odd dollars figure that we paid NC Company. I also know it was more than that because we furnished Mr. Tope parts out of our warehouse. I couldn't make an estimate of what it should be.

Q. Well, I thought possibly you could if you were convinced \$3,232 was too little. If you can't, just say so. A. No, I can't.

Q. Now, you were present in Fairbanks when this settlement agreement was reached with Northern Commercial Company, weren't you?

A. Yes.

Q. Who else was present at that [726] settlement?

A. Truman Sage of Northern Commercial Company.

Q. Was Mr. Stuart Tope present at any time during any of those discussions that led up to the settlement?

A. Just this one discussion that I was on, and Mr. Tope was not there.

Q. Were you or your organization ever asked to appear in Fairbanks any time during the month of August to enter into a conversation with Tope and Northern Commercial Company?

A. Yes, we had.

(Testimony of Carl E. Oaks.)

Q. You didn't go to that conference, did you?

A. No.

Q. As a matter of fact, you sent your office manager, Hancock, up, didn't you?

A. He was—went to Fairbanks, yes.

Q. Hancock was instructed though to go to Fairbanks, but not to meet with Tope, was he not?

A. I don't recall if he was instructed not to meet with Tope. He didn't meet with Tope.

Q. He went in as a matter of fact the day before the date set for the meeting and didn't attend on the day of the meeting, isn't that right?

A. That is right.

Q. Why didn't you go up to the meeting, Mr. Oaks? A. I couldn't go.

Q. Well, wasn't your advance from Williams Company tied up [727] because of that Northern Commercial matter?

A. No, by that time we had gotten it released from Williams Brothers.

Q. That had been accomplished by your bonding company, hadn't it? A. Yes.

Q. So you weren't short of cash any more. You were short of cash at first when they first held up your monies from Williams, weren't you?

A. Yes, we were.

Q. Well, didn't you want Mr. Hancock at least to represent your organization in a discussion with Northern Commercial Company and Tope?

A. We had had so much trouble trying to get Mr.—We had tried to get Mr. Tope to come into

(Testimony of Carl E. Oaks.)

our office and go over his entire account with us and we could never get him to come in there. By that time, through him there had been so much trouble caused I could see no reason for having a meeting with Mr. Tope at Fairbanks.

Q. Mr. Tope wanted to meet with Williams Brothers, too, didn't he? A. Yes, he did.

Q. He wrote you to that effect, didn't he?

A. No, he didn't.

Q. He telephoned you, didn't he? Is that [728] right?

A. I believe he telephoned the girl that worked in our office.

Q. Didn't you write him then and tell him you wouldn't meet with any representative of Williams Brothers or with Northern Commercial Company?

A. I know we wrote that we would not meet with him with Williams. I don't know if we wrote about Northern Commercial Company or not.

Q. Now, I believe the terms of Exhibit 9, the settlement with Northern Commercial Company by Oaks Construction Company provided that Oaks agreed to pay Northern Commercial Company \$5,465.97 for what was agreed to be spare parts used. Is that not right?

A. I believe that's right.

Q. Oaks agreed also to pay Northern Commercial Company \$5,000.00 as a compromising figure over the rentals claimed for the cats during the time they were used, is that not right?

A. Yes, sir.

(Testimony of Carl E. Oaks.)

Q. Now, do you know how you arrived at that \$5,000 figure as a compromise rental payment?

A. I believe we showed Mr. Sage the actual time that these tractors had worked on the job. It was one of the contributing factors. I don't recall all the details why it was arrived just like that.

Q. You knew that Stuart E. Tope, as an individual, was buying this equipment that was the subject of the discussion from [729] Northern Commercial Company, didn't you? A. Yes.

Q. Did you look at the contracts that he was a party to? A. I did not.

Q. At the time you were negotiating a settlement? A. No.

Q. Is it your testimony, Mr. Oaks, that in entering into this compromise rental agreement that you were considering the total number of hours that you thought Tope's machinery had been used rather than the total amount of rentals that would have accrued to Northern Commercial Company under their contracts?

A. We just showed him the time the tractors had worked on the job. And it was considerable less than the billing that we owe to Stuart Construction Company, which we received a copy of.

Q. Did you purport to enter into any agreement with Northern Commercial Company that it was to cover the entire time the cats were used on the job?

A. Yes.

Q. Well didn't you feel that Stuart Tope should be in there and a party to any such agreement?

(Testimony of Carl E. Oaks.)

A. We were not settling Stuart Construction Company's account or Stuart Tope's account.

Q. You were attempting to settle all of Tope's claims for hours [730] of use with NC though, weren't you?

A. We were just trying to arrive at a settlement with NC Company whereby they would not sue us for that account.

Q. But all NC Company were concerned about was the delinquent monthly rentals, wasn't it?

A. I imagine. I am not sure what NC was concerned about.

Q. But it is your testimony that you settled off with a total number of hours that the cats were used on a compromise basis, is that it? A. Yes, sir.

Q. Without Tope being present?

A. Yes, sir.

Q. I show you Exhibit 9. Isn't it a fact that the total settlement figure was \$10,798 and some cents?

A. Yes, sir.

Q. Has all of that amount been paid, Mr. Oaks, or do you know? A. It has been paid.

Q. To Northern Commercial Company?

A. Yes.

Q. By Oaks?

A. There was \$5,000 figure paid by Oaks Construction Company and at a later date there was a balance, whatever it was, paid by Oaks Construction Company, Inc.

Q. There was a balance carried against Oaks by the Fairbanks Office for some period of time,

(Testimony of Carl E. Oaks.)

Q. Wasn't there? [731] A. Yes, there was.

Q. That balance was later transferred by the Northern Commercial Company's Fairbanks office to the Northern Commercial Company office in Anchorage, wasn't it? A. I wouldn't know.

Q. At the time you entered into this settlement in October of 1954, you were considerably indebted to Northern Commercial Company, weren't you?

A. Yes, we were.

Q. Was it in the approximate sum of \$150 to \$200,000?

Mr. Dunn: Your Honor, I object to this. He went into that before. I don't see what Oaks' indebtedness to NC Company has to do.

The Court: It is with reference to the settlement; I presume that is the reason for it.

Mr. Nesbett: Yes.

Q. Was it approximately in those figures, Mr. Oaks?

A. It was in the neighborhood of \$150,000.00.

Q. You haven't paid that Bayless claim, that balance of \$3,000, odd dollars, yet have you, Mr. Oaks? A. No, we have not.

Q. You intend to pay it some time, do you?

A. I told Mr. Bayless that we would pay it some time.

Q. Is the only reason you haven't paid it because you haven't had the money now? [732]

A. That is right.

Mr. Nesbett: I think that's all, your Honor.

The Court: Any redirect?

Mr. Dunn: Very short, your Honor.

(Testimony of Carl E. Oaks.)

Redirect Examination

By Mr. Dunn:

Q. Mr. Tope—— A. I beg your pardon.

Q. I am sorry, sir. I was looking at my notes. Mr. Oaks, Mr. Nesbett questioned you concerning not kicking Tope off the job when Olday fell through with his promise. You did start and immediately start demand and continued to demand a bond from Tope right on out?

Mr. Nesbett: I'll object to the leading question, your Honor. After all this is still somewhat in direct.

Mr. Dunn: Quite a ways from direct.

The Court: Let the witness answer so we can get along.

Mr. Dunn: That is the idea of it.

A. Yes.

Q. Did you finally kick Tope off the job?

A. No, we did not kick him off.

Q. How did he come to leave? A. He left.

Q. Walked off? A. Yes. [733]

Q. I am confused on this testimony concerning the Solano job. Did you state whether or not you knew how much a month you paid Tope for one of his cats?

A. I didn't state how much we paid him, no.

Q. Do you know? A. No, I don't.

Q. When was that job?

A. 1953. July, August and September, I believe.

Q. Finished in August or September of '53?

(Testimony of Carl E. Oaks.)

A. Finished in October of 1953.

Q. You testified on cross-examination, did you not, that you never prepared any tally of operating costs?

The Court: He said that—in direct examination and cross-examination.

Q. By that do you mean of Tope's cats?

A. Yes.

Q. Did you not have Mr. Hancock prepare an operating cost of the overall job? A. Yes.

Q. It has been admitted in evidence here, hasn't it? A. Yes.

Mr. Dunn: No further questions, your Honor.

The Court: Is that all now? Any further cross?

Mr. Nesbett: No, your Honor.

Mr. Dunn: Your Honor, I would like to substitute—well, [734] wait a minute. Perhaps I better identify this.

Q. (By Mr. Dunn): Can you identify this instrument, Mr. Oaks?

The Court: Is that the contract?

Mr. Dunn: It is the original one, yes, sir.

Q. Is that the original contract?

A. Yes, it is.

Mr. Dunn: I would like to substitute this for Plaintiff's Exhibit 1. He said there are some pages missing on that copy.

(Mr. Oaks left the witness stand and returned to his seat.)

The Court: And also on the one attached to the complaint.

(Testimony of Carl E. Oaks.)

Mr. Dunn: I didn't know.

The Court: Well I—at least I—rapid check—it appeared that way to me.

Mr. Dunn: Do you have any objection to the substitution?

Mr. Nesbett: No. I think it should be done. I just want to look at it.

The Court: 5, 6, 7 and 8?

Mr. Nesbett: Yes, your Honor. Could I ask Mr. Oaks a question where he is?

The Court: He might answer it right there if it is not objectionable to you.

Mr. Dunn: No. [735]

Recross-Examination

By Mr. Nesbett:

Q. Looking at Article 5 and 6 it occurs to me, Mr. Oaks, if you agreed to advance the payrolls and agreed to pay the payroll expenses that ordinarily go along with it, such as taxes and so on, why didn't you cover that in your contract?

A. I believe that was taken up after that was signed.

Q. Your contract was written as though the contracting party was going out and completely finance the job, isn't it? A. That is right.

Q. Well, why didn't you alter it to provide for the actual situation if that was such a common practice?

A. Apparently we didn't consider it necessary.

(Testimony of Carl E. Oaks.)

Redirect Examination

By Mr. Dunn:

Q. Did Mr. Tope request any such alteration?

A. No, he didn't.

Mr. Nesbett: I have no objection, your Honor, to this.

The Court: Well, I think it ought to be admitted if it was the original contract; then I would understand.

Mr. Nesbett: It would be Exhibit 1.

The Court: And be substituted for an Exhibit 1?

Mr. Dunn: That is right. Why don't you return the one you have to Mr. Nesbett? That was his.

The Court: Now, gentlemen, is that all your testimony? [736]

Mr. Dunn: Yes, sir.

The Court: Have you rested?

Mr. Dunn: Yes, sir.

The Court: Plaintiff, defendant rests.

Mr. Nesbett: Your Honor, I have Mr. Tope on rebuttal. It won't be too long. We still have argument. I don't know how your Honor feels on that.

The Court: Well——

Mr. Nesbett: Whether we should try to finish today. I don't know what your Honor's thoughts are.

The Court: I'd like to get to work on those cases Monday morning and if the argument, if the rebuttal is short, I think we ought to go along with it, if the attaches of the Court are willing. It will just be a couple of questions?

Mr. Nesbett: On rebuttal.

The Court: I don't want to hurry you gentlemen. I'd rather adjourn until Monday if it unduly hurries you because you have the right to try it in your way.

Mr. Nesbett: Did your Honor plan to have us argue the case or do you want us to argue?

The Court: I thought we would talk about it after the evidence is in.

Mr. Nesbett: I see.

The Court: Suppose Mr. Tope——

Mr. Nesbett: I will call Mr. Tope, your Honor, then [737] for these questions.

(Mr. Tope resumed the witness stand.)

STUART E. TOPE

Direct Examination—Rebuttal

By Mr. Nesbett:

Q. Could I see the deposition of Vincent Abbott. Mr. Tope, you were in Court this morning when Mr. Dunn and I read the deposition of Vincent Abbott, were you not? A. Yes.

Q. Did you have the authority on that pipeline that Mr. Abbott referred to as being your prerogative? A. I did not.

Q. Did you hear Mr. Abbott testify that he had twenty-four years of experience in heavy equipment and construction? A. Yes, I did.

Q. Most of which was in a supervisory capacity? A. That is right.

(Testimony of Stuart E. Tope.)

Q. Was the first time you ever saw him when he appeared up on that pipeline to go to work?

A. No, I saw him at Solano.

Q. I see. How old a man was Mr. Abbott?

A. Between 38 and 40, I presume; I just don't know.

Q. Are you just guessing?

A. I imagine he would be like that. I don't know exactly. I don't know.

Q. Now, he referred in his testimony to the inadvisability of [738] idling caterpillars in sub-zero weather for long periods of time. You heard that testimony, did you not?

A. Yes, I did.

Q. I'll ask you whether or not you received any instructions from caterpillar representatives in Fairbanks, Alaska, prior to going on this job concerning the same practice?

A. Yes, I did.

Q. And what did they tell you?

Mr. Dunn: Objection, your Honor, hearsay.

The Court: It would be hearsay. He can give his opinion from his experience as to whether idling was good for the tractor or not good for it, but whatever instructions he gave would be hearsay.

Q. Were those instructions or statements made to you by caterpillar representatives, represented to be general advice from Caterpillar to users concerning the use of the equipment?

A. That is right.

Mr. Nesbett: Your Honor, I think it would be admissible now to state what he——

(Testimony of Stuart E. Tope.)

The Court: Well, that then is according to his——

Mr. Dunn: Just another way of saying the same thing.

The Court: I know, but he has a right to qualify himself as an expert and being familiar with them and give his opinion. He bases his opinion upon what he had heard.

Q. Simply what was it then, Mr. Tope? [739]

A. I went into a Mr. Cassidy, who is the master mechanic for the Northern Commercial Company.

Q. Don't quote a lot of discussion with Cassidy. What in general did he tell you concerning the advisability or inadvisability of idling a caterpillar?

Mr. Dunn: Hearsay, your Honor, I object.

The Court: Let's hear it.

A. He said it is okay if you idle a cat up to 8, 6 RPM's as long as they were in cold weather.

Q. Do you know whether the practice of idling a cat 24 hours per day is followed in cold weather on Alaskan construction jobs?

A. Yes, they are.

Q. Do you know any particular jobs where the practice is followed?

A. Up in Nome Section, they run the cats 24 hours a day.

Q. How about the Point Barrow job?

A. And on the Point Barrow job, too.

Q. You weren't on either of those jobs?

A. No.

(Testimony of Stuart E. Tope.)

Q. Do you know that from discussions with caterpillar people?

A. With Mr. Allred and Mr. Harlan, who has testified here.

Q. Now when you left that pipeline job, did you testify that you had one caterpillar still operating and on the job? A. Yes, I did. [740]

Q. And did that caterpillar stay on the job after you left? A. Yes, it did.

Q. Were you in the immediate area working on another of your cats? A. Yes, I was.

Q. Do you know that your caterpillar, the last one on the job, was used up to May 1st?

A. Yes.

Q. Now, you heard the deposition of Roy Crawford read. Did you have the authority on that job that Roy Crawford referred to you as having, a complete say-so except that he would consult with you on occasions?

A. You will have to repeat that, please.

Q. Did you have the authority that he referred to you as having? A. No, I did not.

Q. Well, who was running the job when you and Crawford were present? A. Mr. Hager.

Q. And who was over Mr. Hager?

A. Mr. Crawford.

Q. Well, did Mr. Crawford give you on occasion orders? A. Yes, he did.

The Court: I think all of that was brought out on direct.

Mr. Nesbett: I know it was, your Honor. I just

(Testimony of Stuart E. Tope.)

wanted [741] to cover the deposition generally. I think that is all, your Honor.

The Court: Any cross?

Mr. Dunn: Yes, sir.

Cross-Examination—Rebuttal

By Mr. Dunn:

Q. You had quite a bit of maintenance trouble on this job, did you not, Mr. Tope?

A. After we went through the rock pile, yes.

Q. Did you have quite a bit of maintenance trouble?

A. I don't know how to answer that.

The Court: He said he had a great deal after he went through the rocks. Now then, you can ask him if he had any before.

Q. Did you say you had one cat left when you left that job? A. Yes.

Mr. Dunn: No further questions.

Mr. Nesbett: That is all.

The Court: Gentlemen, is that all the testimony?

Mr. Nesbett: That is all, your Honor.

Mr. Dunn: Yes, sir.

The Court: Would you gentlemen, would you come up Monday morning and we will talk about the question of argument and what ought to be done in the future. My impression now is that it would be far more satisfactory—it is important; every [742] lawsuit is important to the litigants and it is important to these parties, and I am—want you to consider the suggestion I am about to make

and that is you provide briefs for me, both of the facts and the law, and give me a little opportunity to think it over. I think it is too important for me to undertake to render a decision immediately. I don't think that ought to be done in this case. Now, would that be agreeable with you gentlemen? If that is true, now you are entitled to be heard on argument, oral argument, if you want to make oral arguments, but I think a briefing of the case supplying me with what you concede to be the facts of the case, briefly the facts and briefly the law, would be far more satisfactory in that you can make your written arguments of the same data. I don't want to deprive counsel of their right to make an oral argument Monday morning. What do you say, Mr.—I wish you'd think it over and both of you come here Monday morning and tell me what you want to do.

Mr. Dunn: Well——

The Court: We wouldn't have time to hear arguments tonight. It wouldn't be fair to the officers of the Court.

Mr. Dunn: Is your Honor asking that the argument be written, too?

The Court: Well, if you want to make an argument, usually they are. When you brief the case, when the rule is that you make your argument——

Mr. Dunn: When would your Honor want this?

The Court: I would leave that to counsel. I would [743] want it speedily, of course, as counsel could reasonably get it done. Can we talk about that Monday morning?

Mr. Nesbett: Yes, your Honor, as far as I am concerned.

Mr. Dunn: All right, sir.

The Court: So I will take the files with me and with my notes, and everything.

Let the Court stand recessed until 10:00 o'clock Monday morning.

(The Court recessed at 5:10 p.m., August 15, 1958.)

(On Monday, August 18, 1958, it was agreed by both parties that their briefs would be filed on or before Thursday, August 28, 1958, to be considered by the Court after his return to Kansas City and thereafter the Court would render an opinion.)

United States of America,
Territory of Alaska—ss.

I, Bonnie T. Brick, Official Court Reporter of the above-entitled Court, hereby certify:

That the foregoing is a true and correct transcript of proceedings on the trial of the above-entitled action, taken by me in stenograph in open court at Anchorage, Alaska, on August 11, 12, 13, 14 & 15, 1958, and thereafter transcribed by me.

/s/ BONNIE T. BRICK.

[Endorsed]: Filed April 20, 1959.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE
ORIGINAL RECORD

I, Wm. A. Hilton, Clerk of the above-entitled Court, do hereby certify that pursuant to Rule 10(1) of the Rules of the United States Court of Appeals, Ninth Circuit, and Rules 75(g) and 75(o) of the Federal Rules of Civil Procedure, I am transmitting herewith the original papers in my office dealing with the above-entitled action or proceeding, as designated by counsel for the appellants and counsel for the appellees.

The papers herewith transmitted constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit, San Francisco 1, California, from the Judgment filed and entered in the above-entitled Cause, dated October 23, 1958, and docketed November 7, 1958, and from the Order filed and entered in the above-entitled cause, dated December 11, 1958, and docketed December 15, 1958.

Dated at Anchorage, Alaska, this 23rd day of April, 1959.

[Seal] /s/ WM. A. HILTON,
Clerk.

[Endorsed]: No. 16470. United States Court of Appeals for the Ninth Circuit. Carl E. Oaks, Williams Brothers Company, McLaughlin, Inc., and Marwell Construction Company, Ltd., Appellents, vs. Stuart Construction Co., Inc., a Corporation, and Stuart E. Tope, Respondent. Transcript of Record. Appeal from the District Court of the District of Alaska, Third Division.

Filed May 8, 1959.

Docketed: May 18, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 16470

CARL E. OAKS, J. BUTCHER and J. E.
NOONAN d/b/a OAKS CONSTRUCTION
COMPANY, WILLIAMS BROTHERS COM-
PANY, McLAUGHLIN, INC., and MAR-
WELL CONSTRUCTION COMPANY, LTD.,

Appellants,

vs.

UNITED STATES OF AMERICA, for the Use
and Benefit of STUART CONSTRUCTION
CO., INC., a Corporation, and STUART E.
TOPE, an Individual,

Appellee.

STATEMENT OF POINTS

Appellants Carl E. Oaks, Williams Brothers
Company, McLaughlin, Inc., and Marwell Con-
struction Company, Ltd., hereby make the following
statement of points:

- (1) Defendant's motions to dismiss should have
been granted.
- (2) Motions for summary judgment on the First
Cause of Action should have been granted.
- (3) Defendants Williams Brothers Company,
McLaughlin, Inc., and Marwell Construction Com-
pany, Ltd., are entitled to judgment against plain-
tiffs, jointly and severally, for costs.

(4) No recovery should be allowed plaintiffs; and Oaks Construction Company is entitled to judgment against plaintiffs, jointly and severally, on its counter-claim.

(5) Any recovery allowed should be based on the written subcontract of December 17, 1953.

(6) An agreement to do that which one already has a binding contractual obligation to do fails for lack of consideration; therefore, the written contract of December 17, 1953, precludes recovery on all other contended, contractual basis.

(7) The alter ego theory is applicable here, and Stuart E. Tope and Stuart Construction Company, Inc., are one and the same legal entity.

(8) Judgment cannot be recovered against a sole individual, even though he be a partner, on a strict partnership transaction.

(9) Neither of plaintiffs is the real party in interest.

(10) Oaks Construction Company is entitled to full credit for all monies paid Northern Commercial Company.

(11) Interest is not recoverable on an unliquidated amount.

(12) A plaintiff cannot recover more than the amount sought in the complaint.

(13) The evidence does not support a bare, rental value of \$35.00 an hour for caterpillar tractors.

/s/ JOHN C. DUNN,

Attorney for Appellants.

[Endorsed]: Filed May 15, 1959.

No. 16472 /

**United States
Court of Appeals**
for the Ninth Circuit

ALAN D. MACLEAN and FRANCIS D. MAC-
LEAN,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

**Appeal from the United States District Court for the
Southern District of California
Central Division**

FILED
AUG 21 1959
PAUL P. O'BRIEN, CLERK



No. 16472

**United States
Court of Appeals**
for the Ninth Circuit

ALAN D. MACLEAN and FRANCIS D. MAC-
LEAN,

Appellants,

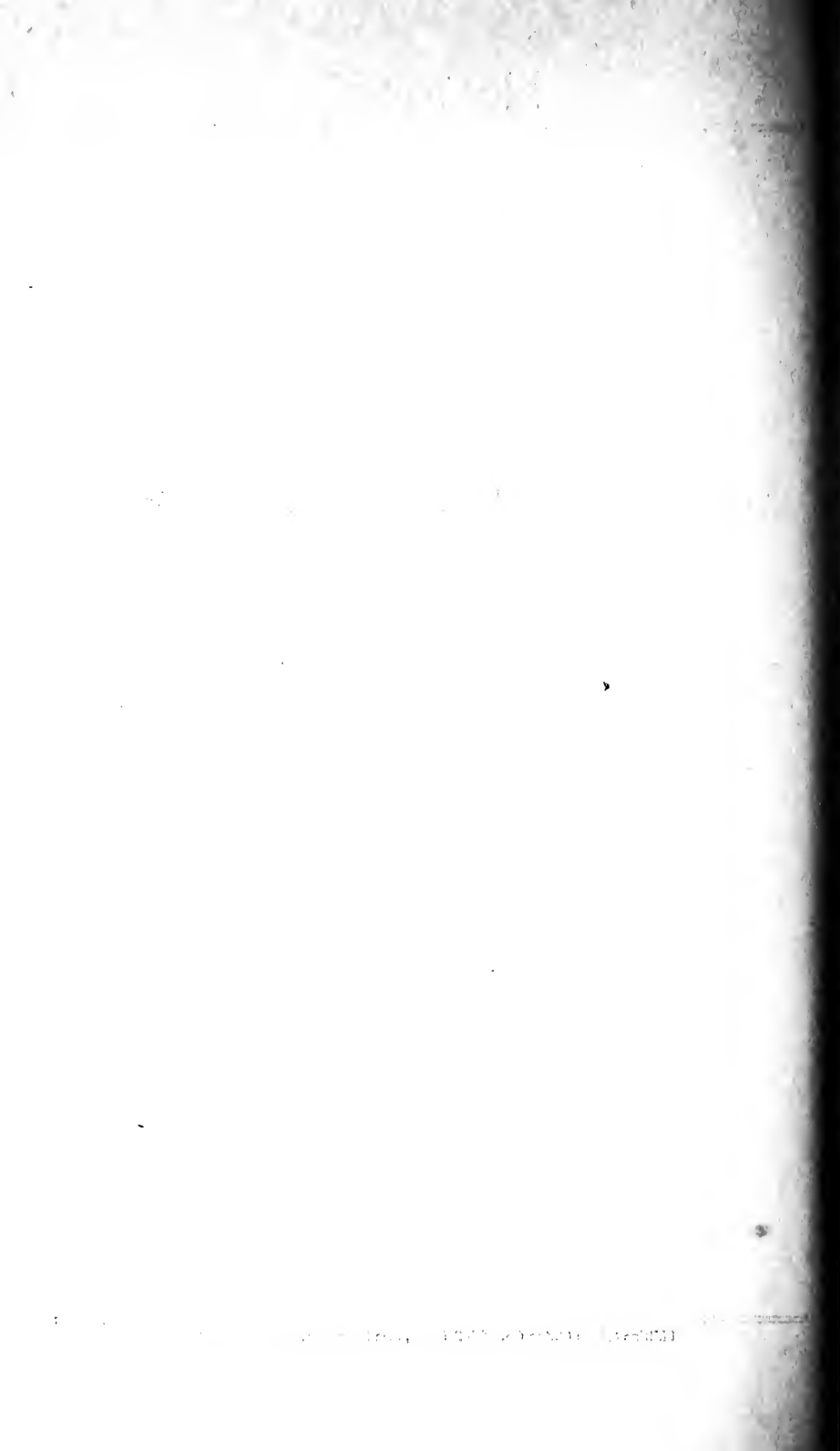
vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

**Appeal from the United States District Court for the
Southern District of California
Central Division**



INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Additional Stipulation of Facts	25
Answer	11
Attorneys, Names and Addresses of	1
Certificate by Clerk	33
Complaint	3
Ex. A—Claim for Refund	7
B—Notice of Disallowance	10
Findings of Fact, Conclusions of Law and Judgment	26
Notice of Appeal	32
Stipulation of Facts	13
Ex. A—Trust Indenture Dated January 12, 1923	16
B—Revocation of Trust Indenture Dated May 27, 1931	20
C—Trust Indenture Dated May 27, 1931	21



NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

ERNEST R. MORTENSON,
FREDERICK L. BOTSFORD,
961 East Green Street,
Pasadena, California.

For Appellee:

HON. CHARLES H. RICE,
Assistant Attorney General;

LEE A. JACKSON,
Attorney, Department of Justice,
Washington 25, D.C.;

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant U. S. Attorney,
Chief, Tax Division;

EUGENE N. SHERMAN,
Assistant U. S. Attorney,
808 Federal Building,
Los Angeles 12, California.



In the District Court of the United States for the
Southern District of California, Central Division

No. 506-58—HW

ALAN D. MacLEAN and FRANCIS D. MacLEAN,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

COMPLAINT

For Recovery of Estate Taxes

Come now the plaintiffs and complain of the defendant as follows:

I.

Plaintiffs, Alan D. MacLean and Francis D. MacLean, are executors of the last will and testament of Elizabeth Beatrice MacLean, deceased. The plaintiffs bring this action against the United States of America to recover estate taxes erroneously and illegally assessed and collected by defendant from plaintiffs. Plaintiffs are citizens of the United States, and jurisdiction is conferred upon this court by 28 USC §1346(a)(1).

II.

Elizabeth Beatrice MacLean died February 20, 1954, a resident of the City of Pasadena, County of Los Angeles, and State of California, leaving a last will and testament, which was duly admitted to

probate in the Superior Court for the County of Los Angeles, State of California, to which jurisdiction in that behalf belonged, and on June 9, 1954, letters testamentary were duly issued out of said court to the plaintiffs, Alan D. MacLean and Francis D. MacLean, who duly qualified as the Executors of the said last will and testament and that at all times hereinafter mentioned, acted as such Executors.

III.

The plaintiffs have a just claim against the defendant for the sum of \$77,675.93 together with interest as provided by law which said sum was paid by the said Executors of the estate of Elizabeth Beatrice MacLean to the defendant through the duly appointed and qualified acting District Director of Internal Revenue for the Southern District of California as hereinafter set forth. The claim is founded upon the laws of the United States relating to internal revenue, to wit: The Internal Revenue Code of 1939, as amended, particularly the section of said Code relating to Federal Estate Tax being §811(c)(1)(b) of the Internal Revenue Code of 1939 (now §2036 of the Internal Revenue Code of 1954).

IV.

On May 17, 1955, said Executors duly executed and filed the United States Estate Tax Return of said estate, in accordance with the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance

thereof. There was no estate tax shown to be due and payable on said return.

V.

Thereafter on June 3, 1957, the District Director of Internal Revenue assessed an additional tax of \$69,045.27. The Commissioner erroneously assessed the tax by including in the gross estate of the decedent, Elizabeth Beatrice MacLean, the value of property transferred by the decedent on January 12, 1923, on the ground that certain changes in the trust arrangement which occurred on May 27, 1931, subjected the transfer to estate tax under §811 (c)(1)(b) of the 1939 Code.

VI.

On August 5, 1957, the said executors of said estate deposited with the duly appointed and qualified acting District Director of Internal Revenue for the Southern District of California the sum of \$77,675.93 to be applied in payment of such United States Estate Tax as was assessed as additional tax in the amount of \$69,045.27 together with interest in the amount of \$8,630.66.

VII.

On September 3, 1957, said executors duly filed with the Commissioner of Internal Revenue in accordance with the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof, a Claim for Refund of \$77,675.93 and therein duly demanded the

refund and repayment of said sum. A copy of such Claim for Refund is attached hereto as Exhibit "A."

VIII.

On March 13, 1958, the Commissioner of Internal Revenue denied and rejected the said Claim for Refund and a notice was mailed by registered mail on said date. A copy of said notice of disallowance is attached hereto as Exhibit "B."

IX.

No part of the sum claimed in the refund claim has been credited, refunded or repaid to the plaintiffs or to anyone for their account.

Wherefore, plaintiffs claim judgment against the defendant in the amount of \$77,675.93 with interest thereon as provided by law.

Dated: 27th day of May, 1958.

Respectfully submitted,

/s/ ERNEST R. MORTENSON,

/s/ FREDERICK L. BOTSFORD,
Attorneys for Plaintiffs.

Duly verified.

EXHIBIT A

U. S. Treasury Department
Internal Revenue Service

CLAIM

To Be Filed With the District Director Where
Assessment Was Made or Tax Paid

The District Director will indicate in the block below the kind of claim filed, and fill in, where required.

☒ Refund of Taxes Illegally, Erroneously, or Excessively Collected.

Name of taxpayer or purchaser of stamps: Estate of Elizabeth Beatrice Maclean, Deceased. Frank D. Maclean, et al., Executors, c/o Frederick L. Botsford, 105 S. Los Robles Ave., Pasadena, Calif.

1. District in which return (if any) was filed: Los Angeles.

2. Name and address shown on return, if different from above: Frank D. MacLean, 2578 Boulder Road, Altadena, California.

3. Period:.....

4. Kind of tax: Estate.

5. Amount of assessment: \$69,045.27.
\$8,630.66 interest.

Dates of payment: August 14, 1957.

6. Date stamps were purchased from the Government:

7. Amount to be refunded: \$69,045.27 and interest.

8. Amount to be abated (not applicable to income, estate, or gift taxes):

9. The claimant believes that this claim should be allowed for the following reasons: See Rider Attached.

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

ESTATE OF ELIZABETH
BEATRICE MACLEAN,

/s/ FRANK D. MACLEAN,
Executor.

/s/ ALAN D. MACLEAN,
Executor.

Dated August 30, 1957.

Instructions

1. The claim must set forth in detail each ground upon which it is made and facts sufficient to apprise the Commissioner of the exact basis thereof.

2. If a joint income tax return was filed for the year for which this claim is filed, both husband and wife must sign this claim even though only one had income.

3. Whenever it is necessary to have the claim executed by an agent on behalf of the taxpayer, an

authenticated copy of the document specifically authorizing such agent to sign the claim on behalf of the taxpayer shall accompany the claim.

4. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

5. Where the taxpayer is a corporation, the claim will be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.

Rider

A non-taxable estate tax return was filed for Decedent Elizabeth Beatrice Maclean on or about May 19, 1955. Under date of June 3, 1957, examining officer John D. McGrew issued a report in which a tax deficiency of \$69,045.27 was determined. The ground for assertion of the deficiency was that the

corpus of an inter-vivos trust should be included in gross estate pursuant to the provisions of Section 811(c)(1)(b) of the Internal Revenue Code of 1939 because of the reservation of a life estate by decedent. The determination of the deficiency is erroneous because decedent's inter-vivos trust was created in 1923. Section 811(a)(1)(b) specifically provides that transfers made before March 4, 1931, are not subject to its provisions.

Estate of Elizabeth Beatrice Maclean, Deceased;
Frank D. Maclean, et al., Executors.

EXHIBIT B

U. S. Treasury Department
Internal Revenue Service
District Director
Los Angeles 12, Calif.

March 13, 1958

In Reply Refer to: FL-219 1232:796.

Estate of Elizabeth Beatrice Maclean, Dec'd.
Frank D. Maclean, et al., Executors,
c/o Frederick L. Botsford, Attorney,
105 So. Los Robles Ave.,
Pasadena 1, Calif.

Claim for Refund of \$69,045.27.

Taxable Period: Date of Death Feb. 20,
1954.

In accordance with the provisions of Section 3772 (a) (2) of the Internal Revenue Code, this notice of disallowance in full of your claim or claims is hereby given by registered mail.

By direction of the Commissioner:

Very truly yours,

/s/ R. A. RIDDELL,
District Director.

Registered: 154780.

FL-219.

[Endorsed]: Filed May 28, 1958.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT,
UNITED STATES OF AMERICA

Comes now the defendant, United States of America, and for answer to plaintiffs' complaint, admits, denies and alleges as follows:

1. Denies the allegations of paragraph I, except it is admitted that plaintiffs, Alan D. Maclean and Francis D. Maclean, are executors of the last will and testament of Elizabeth Beatrice Maclean, deceased; that plaintiffs bring this action against the United States of America to recover estate taxes assessed and collected by defendant from plaintiffs; and that plaintiffs are citizens of the United States, and that jurisdiction is conferred upon this Court by 28 U.S.C., Section 1346(a)(1).

2. Admits the allegations of paragraph II.

3. Denies the allegations of paragraph III.

4. Denies the allegations of paragraph IV, except it is admitted that on May 19, 1955, and not May 17, 1955, as alleged, said executors filed the United States estate tax return of said estate and that there was no estate tax shown to be due and payable on said return.

5. Denies the allegations of paragraph V, except it is admitted that on July 8, 1957, and not June 3, 1957, as alleged, there was assessed a tax of \$69,045.27.

6. Denies the allegations of paragraph VI, except it is admitted that on or about August 15, 1957, the executors of said estate deposited with the District Director of Internal Revenue for the Southern District of California the sum of \$77,675.93 in payment of deficiency estate tax determined by the Commissioner of Internal Revenue in the sum of \$69,045.27 and interest of \$8,630.66, all of which was duly assessed on or about July 8, 1957.

7. Denies the allegations of paragraph VII, except it is admitted that on September 3, 1957, said executors filed with the Commissioner of Internal Revenue a claim for refund of \$77,675.93. Admits that Exhibit "A" to the complaint is a copy of said claim, but, except as specifically admitted herein, defendant denies each and every allegation contained in said claim for refund.

8. Admits the allegations of paragraph VIII.

9. Admits the allegations of paragraph IX.

Wherefore, having fully answered, defendant prays for judgment in its favor, for dismissal of plaintiffs' complaint with prejudice and for all costs and disbursements herein.

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant U. S. Attorney,
Chief, Tax Division;

EUGENE N. SHERMAN,
Assistant U. S. Attorney;

/s/ EUGENE N. SHERMAN,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 30, 1958.

[Title of District Court and Cause.]

STIPULATION OF FACTS

It Is Hereby Stipulated and Agreed as follows, by and between the parties hereto, through their respective counsel, without prejudice to the rights of any party herein to introduce additional evidence not inconsistent herewith and without prejudice to their right to object to the materiality, relevancy, or competency of any of the following facts agreed to; and it is further stipulated and agreed that any

instrument or document referred to herein as an exhibit, or a photo reproduction thereof, may be introduced into evidence without any foundation being laid as to the authenticity, without prejudice to the right of any party to object to the competency (except as hereinabove provided), materiality, or relevancy thereof:

I.

Plaintiffs are citizens of the United States and jurisdiction is conferred upon this Court by 28 U.S.C. §1346(a)(1).

II.

Elizabeth Beatrice Maclean died February 20, 1954, a resident of the City of Pasadena, County of Los Angeles, State of California.

III.

Alan D. Maclean and Francis D. Maclean are the duly appointed and acting Executors of the Last Will and Testament of Elizabeth Beatrice Maclean, deceased, and represent her estate.

IV.

On May 19, 1955, the Executors filed a United States Estate Tax Return for said estate. There was no estate tax shown to be due and payable on said return. Attached to said return were copies of (1) a Trust Indenture dated January 12, 1923, executed by the decedent (attached hereto as Exhibit "A"); (2) a Revocation of said Trust Indenture dated May 27, 1931, and executed by the decedent and her husband, John Alexander Mac-

lean, (attached hereto as Exhibit "B"); and (3) a Trust Indenture dated May 27, 1931, executed by the decedent and L. L. McArthur, Jr., Vice President of the Northern Trust Company (attached hereto as Exhibit "C").

V.

The corpus of said Trust created January 12, 1923, was transferred by John Alexander Maclean, Trustee, to the Northern Trust Company, Trustee, on May 27, 1931.

VI.

The Trust in existence as a result of the execution of the foregoing exhibits was in existence at the date of decedent's death.

VII.

The District Director of Internal Revenue on July 8, 1957, assessed an additional tax of \$69,045.27 resulting from the inclusion in decedent's gross estate of the fair market value, as of the date of decedent's death, of the corpus of the Trust then in existence. Plaintiffs paid the additional estate tax assessment of \$69,045.27 together with interest in the amount of \$8,630.66, a total of \$77,675.93, on August 15, 1957.

VIII.

Plaintiffs filed a Claim for Refund of \$77,675.93 with the Commissioner of Internal Revenue on September 3, 1957.

IX.

The Commissioner of Internal Revenue denied

and rejected the said Claim for Refund on March 15, 1958.

X.

No part of the sum claimed in the refund claim has been credited, refunded or repaid to the plaintiffs or to anyone for their account.

Dated: September 29, 1958.

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant U. S. Attorney,
Chief, Tax Division;

EUGENE N. SHERMAN,
Assistant U. S. Attorney;

/s/ EUGENE N. SHERMAN,
Attorneys for Defendant,
United States of America.

ERNEST R. MORTENSON and
FREDERICK L. BOTSFORD,

By /s/ ERNEST R. MORTENSON,
Attorneys for Plaintiffs, Alan D. and Francis D.
Maclean.

EXHIBIT A

This Indenture, made this 12th day of January, 1923, by Elizabeth Beatrice Maclean, of Chicago, Illinois,

Witnesseth:

That said Elizabeth Beatrice Maclean, for and in consideration of One (\$1.) dollar and other good and valuable considerations, the receipt whereof is hereby acknowledged, does hereby convey, transfer and assign unto John Alexander Maclean, as Trustee, the securities described in Schedule A hereto attached and made a part hereof, which schedule is signed by the parties hereto for identification, to Have and to Hold the same subject to the following trusts, purposes and conditions, to wit:

During the period of trusteeship as hereinafter fixed the Trustee shall hold, manage, care for and protect said trust estate and collect the income therefrom, all in accordance with his best judgment and discretion. The Trustee may hold said trust estate in its present form of investment and is also fully authorized to invest such part of the same as may be converted from time to time into cash in bonds, stocks, real estate mortgages, or in any other income-producing securities, that he thinks best, said Trustee to have as wide latitude in the selection and making of any investments as if he were the absolute owner of said property, and not to be restricted to investments for trustees as fixed by the laws of the State of Illinois. Said Trustee is hereby given full power to sell and convey any and all of said trust property and any reinvestment thereof from time to time for such prices and upon such terms as he sees fit and no purchaser or purchasers shall be obliged to see to the application of the purchase money.

In case of the death, resignation or failure for any reason of said John Alexander Maclean to act as such Trustee then The Northern Trust Company, a corporation existing under the laws of the State of Illinois and located at Chicago, Illinois, shall be the Trustee hereunder with all the rights, titles and powers, whether discretionary or otherwise, which are granted hereunder to said John Alexander Maclean and said The Northern Trust Company, as such Trustee, shall be paid a fair and just compensation out of the trust estate for its services hereunder.

The entire net income from the trust estate shall be paid to Elizabeth Beatrice Maclean during her life.

In case of the death of said Elizabeth Beatrice Maclean before the death of John Alexander Maclean, then, upon her death this trust shall cease and the entire principal of the trust estate, together with any unpaid net income therefrom, shall immediately be and become the absolute estate of said John Alexander Maclean, free from all the trusts hereunder.

In case of the death of said Elizabeth Beatrice Maclean after the death of said John Alexander Maclean, then, upon her death this trust shall cease and the entire principal of the trust estate, together with any unpaid net income therefrom, shall be conveyed, transferred and assigned as said Elizabeth Beatrice Maclean may direct under her Last Will and Testament, and in case she makes no disposition thereof by a valid will then the same shall be

conveyed, transferred and assigned to her descendants then living, per stirpes and not per capita. In case the Trustee has no notice of a valid will of said Elizabeth Beatrice Maclean within three months after her death he shall be fully protected in acting upon the assumption that she made no testamentary disposition of said trust estate.

Said Elizabeth Beatrice Maclean hereby expressly reserves the right of revoking this indenture during the life of said John Alexander Maclean and with his consent only, either in whole or in part by notice in writing to the Trustee and in case of such revocation said trust estate, or the portion thereof as to which this indenture may be revoked, shall be re-conveyed by the Trustee to said Elizabeth Beatrice Maclean, free from all the trusts herein contained.

The Trustee may pay out of the trust estate as a whole any and all inheritance taxes which may be assessed against the trust estate or the interest of any beneficiary therein.

In Witness Whereof said Elizabeth Beatrice Maclean has hereunto set her hand and seal and said John Alexander Maclean, to evidence his acceptance of the trust has hereunto set his hand and seal the day and year first above written.

/s/ ELIZABETH B. MACLEAN.

State of Illinois,
County of Cook—ss.

I, Willis W. Parker, a Notary Public in and for the state and county aforesaid, Do Hereby Certify

that Elizabeth Beatrice Maclean, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that she signed, sealed and delivered the said instrument as her free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and Notarial Seal this Twelfth day of January, 1923.

/s/ WILLIS W. PARKER,
Notary Public.

EXHIBIT B

The Northern Trust Company,

Acting under the right reserved under an Indenture of Trust from the undersigned, Elizabeth Beatrice Maclean to John Alexander Maclean, as Trustee, dated January 12, 1923, and by and with the approval of her husband, John Alexander Maclean, the undersigned Elizabeth Beatrice Maclean does hereby elect to revoke said Indenture of Trust dated January 12, 1923, and hereby directs John Alexander Maclean as Trustee thereunder to transfer all of the property now held under said trust to a new trust created by the undersigned Elizabeth Beatrice Maclean with The Northern Trust Company, Trustee, of even date herewith.

In Witness Whereof the undersigned Elizabeth Beatrice Maclean has hereunto signed her name and

John Alexander Maclean has also signed his name to evidence his approval of this revocation all this 27th day of May, 1931.

/s/ ELIZABETH BEATRICE
MACLEAN.

JOHN ALEXANDER
MACLEAN.

EXHIBIT C

This Indenture, made this 27th day of May, 1931, by Elizabeth Beatrice Maclean, of Chicago, Illinois, Witnesseth:

That said Elizabeth Beatrice Maclean, for and in consideration of One (\$1.) dollar and other good and valuable considerations, the receipt whereof is hereby acknowledged, does hereby convey, transfer and assign to The Northern Trust Company, as Trustee, the securities described in Schedule A hereto attached and made a part hereof, which schedule is signed by the parties hereto for identification, to Have and to Hold the same subject to the following trusts, purposes and conditions, to wit:

During the period of trusteeship as hereinafter fixed the Trustee shall hold, manage, care for and protect said trust estate and collect the income therefrom, all in accordance with its best judgment and discretion. The trustee may hold said trust estate

in its present form of investment and is also fully authorized to invest such part of the same as may be converted from time to time into cash in bonds, stocks, real estate mortgages, or in any other income-producing securities, that it thinks best, said Trustee to have as wide latitude in the selection and making of any investments as if it were the absolute owner of said property, and not to be restricted to investments for trustees as fixed by the laws of the State of Illinois. Said Trustee is hereby given full power to sell and convey any and all of said trust property and any reinvestment thereof from time to time for such prices and upon such terms as it sees fit and no purchaser or purchasers shall be obliged to see to the application of the purchase money; provided, however, that during the lifetime of Elizabeth Beatrice Maclean all sales and investments shall be subject to her approval, but no purchaser from the Trustee shall be obliged to see that such approval has been obtained.

In case any successor in trust should be at any time appointed for the trust estate such successor in trust shall have all the powers and discretions herein given to the original trustee. The Trustee shall receive reasonable compensation for its services and shall be reimbursed for all reasonable expenditures incurred by it in the management of the trust.

The entire net income from the trust estate shall be paid to Elizabeth Beatrice Maclean during her life, and from and after her death such net income shall be paid to John Alexander Maclean, husband

of Elizabeth Beatrice Maclean during the balance of his lifetime.

Upon the death of both Elizabeth Beatrice Maclean and John Alexander Maclean the trust estate shall be divided into two equal parts and be held for the benefit of Francis D. Maclean and Alan D. Maclean, sons of Elizabeth Beatrice Maclean and John Alexander Maclean, during their respective lives.

Upon the death of each of said sons after the trust fund has been set apart for his benefit, then said trust fund shall be held or distributed as such deceased son may have directed in and by his Last Will and Testament and in the absence of such direction shall go to his surviving descendants per stirpes and not per capita, and if there be none then the same shall be added to the fund of the remaining son if he still be living and if not shall go to the descendants of the remaining son then living per stirpes and not per capita.

In case either of said sons should die prior to the death of the one last surviving of Elizabeth Beatrice Maclean and John Alexander Maclean then the one-half share of the trust estate which would have been set apart for said son if living shall go to the descendants, if any, of said deceased son then living, per stirpes and not per capita, and if there be none shall be added to the share of the remaining son or if he likewise shall have died then the same shall go to the descendants of the remaining son then living, per stirpes and not per capita.

Said Elizabeth Beatrice Maclean hereby expressly reserves the right of revoking this indenture during the life of said John Alexander Maclean and with his consent only, either in whole or in part by notice in writing to the Trustee and in case of such revocation said trust estate, or the portion thereof as to which this indenture may be revoked, shall be reconveyed by the Trustee to said Elizabeth Beatrice Maclean, free from all the trusts herein contained.

In Witness Whereof said Elizabeth Beatrice Maclean has hereunto set her hand and seal and for the purpose of identification has signed her name at the foot of the two preceding pages, and said The Northern Trust Company, to evidence its acceptance of the trust has caused this instrument to be signed by its duly authorized officer on the day and year first above written.

/s/ ELIZABETH BEATRICE
MACLEAN.

THE NORTHERN TRUST
COMPANY,

By /s/ L. L. McARTHUR, JR.,
Vice President.

State of Illinois,
County of Cook—ss.

I, Walter J. Madigan, a Notary Public in and for the state and county aforesaid, do hereby certify

that Elizabeth Beatrice Maclean, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that she signed, sealed and delivered the said instrument as her free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and Notarial Seal this 27th day of May, 1931.

[Seal] /s/ WALTER J. MADIGAN,
Notary Public.

[Endorsed]: Filed September 29, 1958.

[Title of District Court and Cause.]

ADDITIONAL STIPULATION OF FACTS

The following Stipulation is added to the Stipulation of Facts herein, dated September 29, 1958.

XI.

John Alexander Maclean, husband of decedent Elizabeth Beatrice Maclean died February 19, 1941.

ERNEST R. MORTENSON, and
FREDERICK L. BOTSFORD,
Attorneys for Plaintiffs,

By /s/ERNEST R. MORTENSON.

LAUGHLIN E. WATERS,
United States Attorney;

EUGENE N. SHERMAN,
Assistant U. S. Attorney,
Attorneys for Defendant;

By /s/ EUGENE N. SHERMAN.

Dated: 20th day of November, 1958.

[Endorsed]: Filed November 20, 1958.

United States District Court for the Southern
District of California, Central Division

No. 506-58—HW Civil

ALAN D. MACLEAN and FRANCIS D. MAC-
LEAN,

Plaintiffs

vs.

UNITED STATES OF AMERICA,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND JUDGMENT

The above-entitled cause came for trial on December 1, 1958, before the Honorable Harry C. Westover, Judge presiding, without the intervention of a jury. Plaintiffs were represented by their counsel, Ernest R. Mortenson and Frederick L. Botsford,

and the defendant by its counsel, Laughlin E. Waters, United States Attorney, Southern District of California; Edward R. McHale, Assistant United States Attorney, Chief, Tax Division, and Eugene N. Sherman, Assistant United States Attorney. The Court having heard and considered all the evidence, stipulation of facts, exhibits, and memoranda of counsel, makes the following findings of fact and conclusions of law.

Findings of Fact

I.

At all times pertinent hereto, plaintiffs were and now are citizens of the United States, and were the duly appointed and acting executors of the Estate of Elizabeth Beatrice Maclean, deceased.

II.

Said decedent died testate on February 20, 1954, a resident of the City of Pasadena, County of Los Angeles, State of California.

III.

The instant action was brought by plaintiffs in their said representative capacity against the defendant United States of America for refund of estate taxes and interest paid, as hereinafter set forth.

IV.

Under date of January 12, 1923, said decedent, as trustor, created a trust wherein her husband, John

Alexander Maclean, was named trustee, and the entire net income of the trust estate, consisting of securities, was reserved to decedent for her life. By the terms of said trust, decedent further reserved the right to revoke the trust during the life of her said husband and with his consent.

V.

On May 27, 1931, by a written document, the decedent expressly revoked the foregoing trust. Said revocation was made in pursuance of, and in compliance with, the right of revocation contained in said trust indenture.

VI.

By a trust indenture dated May 27, 1931, said decedent, on said date, created a new trust wherein she reserved unto herself for her life the entire net income of the trust estate, consisting of securities transferred from said revoked trust.

VII.

Said new trust substantially differed in its terms from said revoked trust; and it constituted a separate, distinct, and different trust from said revoked trust.

VIII.

Said new trust was not a continuation in modified form of said revoked trust.

IX.

Said new trust was revocable by the decedent, with the consent of her said husband, until his

death on February 19, 1941, at which time the trust became irrevocable.

X.

Said new trust was the trust in existence at the date of decedent's death on February 20, 1954.

XI.

On or about May 19, 1955, the plaintiffs, as executors of said estate, duly filed a United States Estate Tax Return for said estate with the District Director of Internal Revenue at Los Angeles, California. There was no estate tax shown to be due and payable on said return.

XII.

Thereafter, on or about August 15, 1957, the plaintiffs paid the sum of \$77,675.93 to the District Director of Internal Revenue at Los Angeles, California, as a deficiency of estate taxes and interest assessed by the Commissioner of Internal Revenue.

XIII.

Plaintiffs filed a timely claim for refund for the estate taxes and interest which were paid as hereinabove set forth, and the instant action was timely filed.

XIV.

All conclusions of law which are or are deemed to be findings of fact are hereby found as facts and are incorporated herein as findings of fact.

Conclusions of Law

I.

This Court has jurisdiction of the subject matter and of the parties hereto.

II.

The plaintiffs have not sustained their burden of proving that the trust in existence at the date of decedent's death was the result of a transfer in trust made by decedent before March 4, 1931.

III.

The trust of May 27, 1931, constituted a new, separate, distinct, and different trust from the revoked trust of January 12, 1923.

IV.

Said new trust was not a continuation in modified form of said revoked trust.

V.

Said new trust was revocable by the decedent, with the consent of her said husband, until his death on February 19, 1941, at which time the trust became irrevocable.

VI.

Said new trust was the trust in existence at the date of decedent's death on February 20, 1954.

VII.

Said trust in existence at the date of decedent's death was the result of a transfer in trust made by the decedent after March 4, 1931, within the mean-

ing of Section 811(c)(1)(B) of the Internal Revenue Code of 1939, as amended, and within the meaning of the Joint Resolution of Congress of March 3, 1931 (46 Stat. 1516).

VIII.

The value of the property which comprised the corpus of said trust in existence at the date of decedent's death was includible in decedent's gross estate under Section 811(c)(1)(B) of the Internal Revenue Code of 1939, as amended, and under the Joint Resolution of Congress of March 3, 1931 (46 Stat. 1516).

IX.

All findings of fact which are deemed to be conclusions of law are hereby incorporated in these conclusions of law.

X.

Defendant is entitled to judgment that plaintiffs take nothing, that their complaint in the instant action be dismissed with prejudice, and for defendant's costs herein to be taxed by the Clerk of this Court.

Judgment

In accordance with the foregoing findings of fact and conclusions of law, it is hereby ordered, adjudged and decreed that:

- 1) The plaintiffs Allen D. Maclean and Francis D. Maclean take nothing;
- 2) Plaintiffs' complaint be dismissed with prejudice; and

3) The defendant do have and recover from the plaintiffs its costs taxed by the Clerk of this Court in the sum of \$20.00.

Dated: This 11th day of March, 1959.

/s/ HARRY C. WESTOVER,
United States District Judge.

Certificate of Service attached.

Lodged March 3, 1959.

[Endorsed]: Filed March 11, 1959.

Entered March 13, 1959.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Alan D. Maclean and Francis D. Maclean, the plaintiffs, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on March 13, 1959.

Dated: March 18, 1959.

ERNEST R. MORTENSON, and
FREDERICK L. BOTSFORD,

By /s/ ERNEST R. MORTENSON.

[Endorsed]: Filed March 19, 1959.

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the foregoing documents together with the other items, all of which are listed below, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case; and that said items are the originals unless otherwise shown on this list:

A. Complaint, filed 5/28/58.

Answer of Defendant, filed 7/30/58.

Stipulation of Facts, filed 9/29/58.

Additional Stipulation of Facts, filed 11/20/58.

Findings of Fact; Conclusions of Law and Judgment, entered 3/13/59.

Notice of Appeal, filed 3/19/59.

Designation of contents of Record on Appeal and Statement of Points on which Appellant intends to rely, filed 4/16/59.

Dated: April 27, 1959.

[Seal] JOHN A. CHILDRESS,
Clerk.

By /s/ WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 16472. United States Court of Appeals for the Ninth Circuit. Alan D. Maclean and Francis D. Maclean, Appellants, vs. United States of America, Appellee. Transcript of the Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: April 23, 1959.

Docketed: May 18, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

No. 16472

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

ALAN D. MACLEAN and FRANCIS D. MACLEAN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the Judgment of the United States District
Court for the Southern District of California.

BRIEF FOR THE APPELLANTS.

CARLST R. MORTENSON,
901 East Green Street,
Pasadena, California,
Attorney for Appellants.

FILED

OCT 12 1959

PAUL P. O'BRIEN, CLERK

TOPICAL INDEX

	PAGE
Opinion below	1
Jurisdiction	1
Statutes involved	1
Statement of facts.....	1
Question presented	5
Argument	5
Conclusion	21
Appendix A. Statutes involved.....	App. p. 1

TABLE OF AUTHORITIES CITED

CASES	PAGE
Cuddihy v. Commissioner of Internal Revenue, 32 T. C. 110.....	7, 8, 9, 14
Gould v. Gould, 245 U. S. 151, 38 S. Ct. 53, 3 A. F. T. R. 2958, affm'g 168 App. Div. 900, 152 N. Y. Supp. 1114.....	16, 18, 19, 21
Kern River Oilfields case, 78 F. 2d 631, 16 A. F. T. R. 438.....	19
Kern River Oilfields of California, Ltd. v. Welch, 15 A. F. T. R. 941.....	19
Lewellyn v. Harbison, et al., 31 F. 2d 740, 7 A. F. T. R. 8614, rvrs'ng 26 F. 2d 126.....	15
Means v. United States, 39 F. 2d 748, 69 Ct. Cls. 539.....	7
Owl Drug Co., In re, 21 Fed. Supp. 907, 20 A. F. T. R. 729	19, 20
Reinecke v. Northern Trust Company, 49 S. Ct. 123, aff'ng rvrs'ng 24 F. 2d 91.....	7
Schwabacker v. Commissioner, 132 F. 2d 516, 30 A. F. T. R. 634	16
Smith, Executor, v. United States, 139 Fed. Supp. 305.....	7, 8
United States v. Field, 255 U. S. 257, 41 S. Ct. 56, 3 A. F. T. R. 3095.....	17
Weaver v. Commissioner, 97 F. 2d 31, 21 A. F. T. R. 310.....	16, 18
Weible v. United States, 244 F. 2d 158, 51 A. F. T. R. 259.....	16

STATUTES

Internal Revenue Code of 1939, Sec. 811(c).....	14, 15, 18
Internal Revenue Code of 1939, Sec. 811(c)(1).....	6, 7, 15, 16, 18, 21
Internal Revenue Code of 1939, Sec. 811(c)(1)(B).....	5, 7, 8, 20, 21
Internal Revenue Code of 1939, Sec. 811(c)(1)(b).....	6, 16
Revenue Act of 1916, Sec. 202(a).....	17
Revenue Act of 1916, Sec. 202(b)	17, 18
United States Code Annotated, Title 28, Sec. 1291.....	1
United States Code Annotated, Title 28, Sec. 1346(a)(1).....	1

No. 16472
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

ALAN D. MACLEAN and FRANCIS D. MACLEAN,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal From the Judgment of the United States District
Court for the Southern District of California.

BRIEF FOR THE APPELLANTS.

Opinion Below.

The District Court rendered no Opinion.

Jurisdiction.

The District Court had jurisdiction of this matter under 28 U. S. C. A., §1346(a)(1). This Court has jurisdiction under 28 U. S. C. A., §1291.

Statutes Involved.

The pertinent statutes and regulations are set out in Appendix "A" to this brief.

Statement of Facts.

All of the material facts of the case were stipulated at the trial before the District Court. The facts are summarized as follows:

Elizabeth Beatrice Maclean, a resident of Pasadena, California died February 20, 1954 [T R 14]. Appellants herein are citizens of the United States and Executors of the Last Will and Testament of the decedent [T R 14].

On May 19, 1955, the Executors filed a Federal estate tax return for said estate showing no estate tax to be due [T R 14, Par. IV Stip.]. The Director of Internal Revenue assessed an additional estate tax of \$69,045.27 on June 8, 1957. The additional tax with interest in the amount of \$8,630.66, (a total of \$77,675.93) was paid by the Executors on August 15, 1957 [T R 15, Par. VII Stip.]. A Claim for Refund of the amount of Federal state tax and interest paid was filed with the Commissioner of Internal Revenue by the Executors on September 3, 1957, [T R 15, Stip. VIII]. The Claim for Refund set out the following ground for the allowance thereof:

“The ground for assertion of the deficiency was that the corpus of an inter-vivos trust should be included in gross estate pursuant to the provisions of Section 811(c)(1)(b) of the Internal Revenue Code of 1939 because of the reservation of a life estate by decedent. The determination of the deficiency is erroneous because decedent’s inter-vivos trust was created in 1923. Section 811(c)(1)(b) specifically provides that transfers made before March 4, 1931, are not subject to its provisions.” [Par. VII, Ex. A, Complaint; T R 5-8; Par. 7; Answer, T R 12].

The Commissioner of Internal Revenue rejected the Claim for Refund on March 15, 1958 [T R 15-16, Stip. IX]. No part of said Federal estate tax or the interest thereon has been credited, refunded or repaid [T R 16, Stip. X]. This action was commenced by filing a Com-

plaint upon said rejected Claim for Refund on May 28, 1958 [T R 3-11]. The District Court entered judgment for the defendant on March 13, 1959 [T R 32], and a Notice of Appeal from said judgment was filed by the plaintiffs on March 19, 1959 [T R 32].

Assessment of the additional Federal estate tax with which this Appeal is concerned resulted from the inclusion, by the District Director, in decedent's gross estate of the fair market value, as of the date of decedent's death, of the corpus of a trust then in existence [T R 15, Stip. VII]. The genesis of said Trust was:

On January 12, 1923, the decedent executed a Trust Indenture [T R 14, Ex. A, Stip. IV]. By this indenture decedent conveyed the corpus of the trust to John Alexander Maclean, her husband, as trustee [T R 17, 18]. The trust indenture further provided that in case of the death, resignation or failure for any reason of John Alexander Maclean to act as trustee, then the Northern Trust Company, an Illinois corporation, should be Trustee with like powers [T R 18].

On May 27, 1931, John Alexander Maclean, Trustee, did transfer the corpus of the trust created on January 12, 1923, to the Northern Trust Company, Trustee and thereafter ceased to himself act as Trustee [T R 15, Stip. IV, V, Ex. C]. There said corpus rested until Elizabeth Beatrice Maclean died on February 20, 1954 [T R 15, Stip. VI, T R 14, Stip. II]. John Alexander Maclean, husband of the decedent died February 19, 1941 [T R 25, Add. Stip.].

By the Trust Indenture of January 12, 1923, the decedent reserved the entire net income of the trust to herself for life [T R 18]. She also reserved the right to revoke the Trust either in whole or part during the life

of her husband, provided he consented to such revocation, by notice in writing to the trustee. In case of such revocation the trust estate, or the portion thereof to which the revocation applied, was to be reconveyed to Elizabeth Beatrice Maclean by the Trustee, free from all the trusts created by the indenture [T R 19, Ex. A, Stip. IV].

On May 27, 1931, Elizabeth Beatrice Maclean and John Alexander Maclean directed a notice to the Northern Trust Company (The alternative trustee named in the indenture of Jan. 12, 1923). This notice stated that it had been elected to revoke the Trust of January 12, 1923, and John Alexander Maclean, as Trustee thereunder, was directed to transfer all the property held under said trust to a new trust created by Elizabeth Beatrice Maclean with the Northern Trust Company, Trustee, as of the date of the notice of election to revoke [T R 20, Ex. B, Stip. IV]. Note must be made of the fact the corpus of the trust was not reconveyed to Elizabeth Beatrice Maclean as required by the terms of the indenture of January 12, 1923 [Stip. IV, Ex. A, T R 16-19]. Instead the Trustee conveyed the corpus to the alternative trustee under a modified trust agreement [T R 15, Stip. V], and then ceased himself to act as Trustee.

On May 27, 1931, the same day that notice of revocation of the earlier trust was given the Northern Trust Company, Elizabeth Beatrice Maclean made an indenture naming the Northern Trust Company as Trustee of the securities transferred to it by John Alexander Maclean [T R 20, 21 Exs. B and C, Stip. IV]. The modified indenture reserved the income of the trust to Elizabeth Beatrice Maclean for life and thereafter to John Alexander Maclean for the balance of his life [T R 22, 23, Ex. C, Stip. IV].

Elizabeth Beatrice Maclean reserved the right to revoke the Trust as modified on May 27, 1931, but only with her husband's consent. The reservation of the right to revoke was couched in identical language by both the original and modified trust indentures [Exs. A and C, Stip. IV, T R 19, 24]. The Trust as modified on May 27, 1931, was never revoked. It was in force when Elizabeth Beatrice Maclean died on February 20, 1954.

Question Presented.

Did Elizabeth Beatrice Maclean, the decedent, transfer the property giving rise to this action in trust prior to March 3, 1931 within *the meaning and intent of §811 (c) (1) (B) of the Internal Revenue Code of 1939?*

ARGUMENT.

Elizabeth Beatrice Maclean, the decedent, transferred the property giving rise to this action in trust to John Alexander Maclean on January 12, 1923 within the meaning and intent of §811 (c) (1) (B) of the Internal Revenue Code of 1939, and he, upon his retirement as a trustee, transferred the corpus of the trust to the Northern Trust Company, the alternative trustee.

The record on appeal is short. The facts are wholly agreed. The question to be answered is simple on its face. That question is: "When did the decedent transfer the property that the Director of Internal Revenue has added to her gross estate?" In spite of the apparent simplicity of the question three possible answers are suggested by the controversy that has arisen between the parties to this action. Those answers are:

- (1) January 12, 1923, when the trust was created.
Appellants contend this is the correct answer;

- (2) February 19, 1941, when the decedent's husband died. Appellee has successfully contended for this date in the Court below;
- (3) May 27, 1931. Appellants and Appellee have stipulated as a fact this transfer was made by the trustee rather than the decedent. The Government is in no position to contend on the record that May 27, 1931, is the correct answer to the question posed.

The District Court, without finding as a fact the date on which the questioned transfer was made concluded as a matter of law, [CL VII, T R 30], that the Trust in existence at the date of Elizabeth Beatrice Maclean's death was the result of a transfer in trust made by her after March 4, 1931 within the meaning of §811 (c) (1) (b) of the *Internal Revenue Code of 1939*. It is therefore necessary to assume the District Court held the transfer occurred on February 19, 1941 when John Alexander Maclean died. (Stipulation of Fact No. V, T R 15 eliminates the possibility that the decedent made the transfer on May 27, 1931. John Alexander Maclean made that transfer to the Northern Trust Company, Trustee) *Section 811 (c) (1) of the Internal Revenue Code of 1939* as amended, reads in part:

“the value of the gross estate of the deceased shall be determined by including the value at the time of his death of all property * * * (c)(1) GENERAL RULE—to the extent of any interest therein of which the *decedent has* * * * at any time *made a transfer* * * * by trust or otherwise in” [Emphasis supplied].

This statute does not say that an interest which the Trustee transferred by his death shall be included in the

gross estate of the creator of the Trust. It is only property of which the decedent, whose estate is being taxed, has made a transfer that §811 (c) (1) requires be included in his gross estate. Even this requirement is limited with respect to property transferred prior to March 4, 1931, by the provisions of §811 (c) (1) (B) of the Code.

In fairness to the District Court it must here be said its action found some support in the solitary precedent of the case of *Smith, Executor v. United States*, Ct. Cls. 139 Fed. Supp. 305 (1956). The Court of Claims' Opinion was rendered by three Judges and there were two strong dissents from the majority Opinion. Search discloses only the District Court in the present case, to have followed *Smith v. United States (supra)*.

As a precedent for its decision, the Court of Claims relied upon its earlier decision in the case of *Means v. United States*, 39 F. 2d, 748, 69 Ct. Cls. 539 (1930). The *Means* case is distinguishable on the facts. Gift taxes were the subject matter of the *Means* case and estate taxes of the *Smith* case. More important in the *Means* case, the creator of the Trust alone reserved the power of revocation. In the *Smith* case only the Trustee, who chanced to be also the husband of the grantor, could revoke the trust by giving his consent to her request so to do. Likewise in the case of *Reinecke v. Northern Trust Company*, 49 S. Ct. 123 (1928) affirming and reversing CCA-7, 24 F. 2d, 91 which affirmed DC, D Ill. the grantor of the Trust alone held the power of revocation. It is submitted that the dissenting opinions in the *Smith* case, which are in harmony with the decision of the Tax Court in the case of *Cuddihy v. Commissioner of Internal Revenue*, 32 T. C. 110 (1959) correctly announced that it is unimportant when the power of rev-

ocation or termination was relinquished. The controlling date is when the transfer in trust was made by the decedent. That is, stipulated to have occurred on January 12, 1923. Such transfers of property prior to March 3, 1931 serve to exclude the property transferred from the gross estate of the grantor. §811 (c) (1) (B), *Internal Revenue Code of 1939*.

In the recent case of the *Estate of Robert J. Cuddihy, deceased et al. v. Commissioner of Internal Revenue*, 32 T. C. 110 (September 10, 1959) the Tax Court of the United States expressly declined to follow the Court of Claims' majority opinion in the case of *Smith v. United States*, (*supra*). In that case, as here, a deficiency in Federal Estate taxes was determined by using §811 (c) (1) (B) as the statutory vehicle for placing a portion of the corpus of a reciprocal trust created by the decedent on May 20, 1926, in his gross estate at the time of his death on December 22, 1952. The *Cuddihy* trust was made terminable in favor of the decedent's issue by the trustees with the consent of a majority in interest of the income beneficiaries. Decedent's wife and three sons were the trustees. On November 21, 1941, the wife resigned as trustee. She died June 2, 1944. On May 15, 1946, decedent released his right to consent to the termination of the wife's trust. February 7, 1949, decedent waived any possible interest he might have in the corpus of either trust. On April 8, 1948, decedent released his right to receive income from his wife's trust and thereafter received no income from that trust.

The Commissioner of Internal Revenue took the position that one-half of the value of the corpus of the wife's trust was includible in decedent's gross estate under §811 (c)(1)(B) of the Internal Revenue Code of 1939, because

the decedent had retained for his life the possession or enjoyment of, or the right to one-half the income from the trust property.

In its decision in the *Cuddihy* case the Tax Court said:

“The petitioner contends however (1) that since the Emma F. Cuddihy Trust was created prior to March 4, 1931, it is specifically excluded from the operation of section 811(c)(1)(B) by the last sentence of section 811(c), and (2), in any event, section 811(c)(1)(B) is not applicable because prior to his death the decedent had relinquished all rights in the trust, including any rights to income and possession or enjoyment of the property.

The last sentence of section 811(c) provides that “*Subparagraph (B) shall not apply to a transfer made before March 4, 1931; * * **” This provision on its face appears clearly to exclude from the operation of section 811(c)(1)(B) a transfer in trust made on May 20, 1926. *The respondent maintains, however, that “a transfer” in trust cannot be “made” before March 4, 1931, where, as here, the trust was terminable with the grantor’s consent.* The respondent asserts that “a transfer” within the meaning of the last sentence of section 811(c) did not take place until May 15, 1946, when the decedent by instrument released his right to join in the termination of the trust. The respondent has here advanced an elaborate argument based upon the legislative and judicial history of section 811(c)(1).

Tracing his argument briefly, the respondent first points to the decision of the Supreme Court in *May v. Heiner*, 281 U. S. 238 [8 AFTR 10904], in which it was held under the Revenue Act of 1918, requiring

the inclusion in a decedent's gross estate of any property transferred during his life-time "intended to take effect in possession or enjoyment at or after his death," that an irrevocable transfer in trust under which the decedent-settlor had retained a life interest was not includible in his estate. In March 1931 Congress passed a joint resolution (46 Stat. 1516) amending the estate tax provisions by prospectively providing that a transfer of property subject to a life interest reserved in the transferor is includible in his gross estate. Transactions involving transfers of property occurring prior to 1931, of course, were governed by the holding of the Supreme Court in *May v. Heiner*, supra. In 1949, however, the Supreme Court in *Commissioner v. Church*, 335 U. S. 632 [37 AFTR 480], overruled its previous holding in *May v. Heiner*, supra, with the result that pre-1931 transactions involving a transfer of property subject to a life interest were made subject to inclusion in the gross estate. *Congress, in the Technical Changes Act of 1949, thereupon added the last sentence of section 811(c) of the 1939 Code, which provided that Section 811(c)(1)(B) should not apply to "a transfer made prior to May 4, 1931."* The congressional purpose underlying the enactment of the exemption contained in the last sentence of section 811(c) was the protection of decedents who had relied upon the decision of the Supreme Court in *May v. Heiner*, supra, with respect to pre-1931 transactions. S. Rept. No. 831, 81st Cong., 1st Sess., 1949-2 C. B. (Part 2) 289, 293. The respondent accordingly contends that the exemption provided by the last sentence of section 811(c) is inapplicable to any transfer of property other than one which is

identical to that involved in *May v. Heiner*, *supra*, and, therefore, a transaction, to be eligible under that exemption, must not be revocable or terminable by the transferor.

In support of his position, the respondent relies upon the decision of the United States Court of Claims in *Smith v. United States*, 139 F. Supp. 305 [49 AFTR 696]. The transaction there involved was a trust created in 1923 under which the decedent reserved the right to income for life. The decedent's husband, one of two trustees, was given power in his sole discretion to modify or revoke the trust. Further, the settlor, jointly with her husband, could modify, terminate or revoke the trust. The Court of Claims, in a three to two decision, held that the last sentence of section 811(c), exempting "a transfer made prior to March 4, 1931," refers only to an irrevocable transfer in trust, and that since the decedent needed only to obtain the consent of her husband (who had no adverse interest) in order to revoke the trust and recover the property, the transaction was not "a transfer" within the meaning of the exemption provided in section 811(c). In so holding, the majority opinion relied in part upon several gift tax cases which hold that a transfer of property is incomplete for purposes of creating a taxable gift if the transferor retained a power of revocation over the property. *Burnet v. Guggenheim*, 288 U. S. 280 [11 AFTR 1392]; *Sanford's Estate v. Commissioner*, 308 U. S. 39 [23 AFTR 756]; *Means v. United States*, 39 F. 2d 748 [8 AFTR 10603].

In our opinion, the transaction involved in *Smith v. United States*, *supra*, is factually distinguishable from the one here presented. The trust created by the

decedent in the Smith case was revocable in favor, of the settlor by her joint action with her husband, whereas the transfer here was completely irrevocable. Only with the consent of at least four of the children of the decedent could a termination of the trust be accomplished, and then only in favor of the decedent's children. The decedent possessed no right or power after the creation of the trust in 1926 by which he might recover the property.

Moreover, the court's reliance in the Smith case upon the gift tax decisions cited above as bearing on the meaning of the word "transfer" as used in section 811(c) is we think inapposite. A transaction held to constitute a transfer for estate tax purposes is not necessary to be regarded as a transfer under the gift tax provisions. Smith v. Shaughnessy, 318 U. S. 176, 130 AFTR 388]. The reason for a variation in treatment of the same transaction under two different provisions of the Internal Revenue Code is that only a completed transfer of the beneficial interest can support the imposition of a gift tax, whereas the estate tax attaches to whatever interest in transferred property is retained by the decedent at the time of his death.

Consequently, we do not consider the decision of the Court of Claims in *Smith v. United States*, *supra*, controlling in the resolution of the issue here presented.

The respondent's reliance upon the legislative history of section 811(c)(1) is not persuasive because the wording of the statute, which speaks simply of "a transfer made before March 4, 1931," is plain and unambiguous, Crooks v. Harrelson, 282 U. S. 58 [9 AFTR 571]; Alexander C. Yarnall, 9 T. C. 616,

affd. 170 F. 2d 272 [37 AFTR 355]. Taken in its normal sense, the application of the statutory phrase in question to a transfer in trust appears to refer to the time of the transfer of title to the trustee, rather than to some subsequent time when a retained right or power is released. The exemption section neither mentions nor implies the nonexistence of a right to terminate as requisite to an exempt transfer, and we see no reason to read into it an exception not stated or implied.

We are supported in our view of the meaning to be placed on the words "a transfer made before March 4, 1931," by the fact that it is consistent with the statutory usage of the word "transfer" in section 811. Section 811(d), for example, imposes an estate tax on a "transfer" that is revocable by the decedent. Section 811(c)(1)(B) taxes a "transfer" under which the decedent has retained possession, enjoyment, or the right to income from the transferred property. Section 811(c)(1)(C) taxes a "transfer" intended to take effect in possession or enjoyment at or after his death. *It is, therefore, apparent that the word "transfer," as used in section 811, does not necessarily refer to an absolute or completed transfer of the entire beneficial interest in the conveyed property identical words used in different parts of the same statute must be construed to mean the same thing unless a contrary meaning is clearly shown.* *United States v. Olympic Radio and Television*, 349 U. S. 232 [47 AFTR 662]; *Helvering v. Stockholms Enskilda Bank*, 293 U. S. 84 [14 AFTR 675].

For the foregoing reasons, we are of the opinion that *the transfer to which the last sentence of section 811(c) refers is the transfer of legal title to a*

trustee upon the creation of a trust prior to March 3, 1931. A transfer in trust under which a settlor retains a right to join in a termination solely in favor of his children clearly falls within the terms of that exemption. We accordingly hold that the transaction here involved, which occurred on May 20, 1926, is excluded from the operation of section 811(c)(1)(B)." (Italics ours.)

The Commissioner of Internal Revenue took the position at the trial of the *Cuddihy* case that a "transfer" did not take place within the meaning of the last sentence of §811(c) of the Internal Revenue Code of 1939 until May 15, 1946, when the decedent released his right to join in the termination of the trust. He was not upheld in this position by the Tax Court.

In the case now here on appeal the District Court has upheld the Commissioner's Assertion that a "transfer" within the meaning of the last sentence of §811(c) of the *Internal Revenue Code of 1939* did not take place until February 19, 1941, when the decedent lost all possibility of the revocation or termination of her trust through the death of John Alexander Maclean, her husband. Her trust could only be revoked or terminated during his life and with his consent.

It is submitted that this decedent who lost whatever power she may have had to revoke or terminate a trust to which she had made a transfer of property prior to March 4, 1931, because of her husband's involuntary act of dying, is in at least as favorable a position as the decedent in the *Cuddihy* case (*supra*), who gave up a right of termination voluntarily and by his own Act. The Court excluded the corpus of the *Cuddihy* trust from the gross estate upon the authority of the last sen-

tence of §811(c), for the reason that the transfer to the trust was made on May 20, 1926. The District Court erred in not excluding the corpus of the Maclean trust from the decedent's gross estate for the same reason.

The following pertinent sentence from the Tax Court's opinion is one to which appellants here desire to direct the Court's attention:

"The respondent's reliance upon the legislative history of §811(c)(1) is not persuasive because the wording of the statute, which speaks simply of 'a transfer made before March 4, 1931' is plain and unambiguous." Appellants accept this view of the statute and suggest it is in harmony with the underlying legislative history. Appellants contend the same ultimate decision should be reached by a Court that completely disagreed with the Tax Court on its conclusion with respect to the clarity of the language found in §811(c)(1) of the *Internal Revenue Code of 1939*.

Two rules of statutory construction bear examination at this point. These rules are succinctly set out by the Circuit Court of Appeals for the Third Circuit with its opinion rendered in the case of *Lewellyn v. Harbison, et al.*, 31 F. 2d 740, 742, 7 A. F. T. R. 8614, 8616 (1929) reversing D. C. W. D. Pa. 26 F. 2d 126. The pertinent language of the opinion reads:

"* * * while a statute imposing taxes is construed most strongly against the government (*Gould v. Gould*, 245 U. S. 151, 38 S. Ct. 53, 62 L. Ed. 211), it is also true that a statute allowing exemptions is construed strictly in favor of the Government (*Bank of Commerce v. Tennessee*, 161 U. S. 134, 146, 16 S. Ct. 456, 40 L. Ed. 645) * * *".

The Ninth Circuit has applied both rules where the occasion arose. *Weaver v. Commissioner*, 97 F. 2d 31, 34, 21 A. F. T. R. 310, 313 (1938) and *Schwabacker v. Commissioner*, 132 F. 2d 516, 518, 30 A. F. T. R. 634, 636 (1942), *Weible v. United States*, 244 F. 2d 158, 162, 51 A. F. T. R. 259 (1947). §811(c)(1)(b) of the *Internal Revenue Code of 1939* and the *Joint Resolution of Congress of March 3, 1931*, 46 Stat. 1516 both impose Federal estate taxes. Their inherent ambiguities, if any, must be construed in favor of the taxpayer and against the Government.

It follows that if the language of §811(c)(1) of the *Internal Revenue Code of 1939* is clear and unambiguous, then the corpus of the Elizabeth Beatrice Maclean trust is to be excluded from her gross estate because she made the transfer to the trust before March 3, 1931, and the statute says in plain words that it does not apply to such transfers. If the language of §811(c)(1) of the *Internal Revenue Code* is cloudy, doubtful, confused, ambiguous or unintelligible, then the corpus of the Elizabeth Beatrice Maclean trust must also be excluded from her gross estate because of the rule of statutory construction that requires such doubts to be resolved against the Government and in favor of the citizen.

Cases supporting this rule of construction are too numerous for citation. Among them are:

Gould v. Gould, 245 U. S. 151, 38 S. Ct. 53, 3 A. F. T. R. 2958 (1917) Affirming S. Ct. N. Y. (168 App. Div. 900, 152 N. Y. Supp. 1114).

“* * * In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations

so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen. *United States v. Wigglesworth*, 2 Story 369, Fed. Cas. No. 16,690; *American Nct & Twine Co. v. Worthington*, 141 U. S. 468, 474, 12 S. Ct. 55, 35 L. Ed. 821; *Bensiger v. United States*, 192 U. S. 38, 55, 24 Sup. Ct. 189, 48 L. Ed. 332. * * *

In the case of *United States v. Field*, 255 U. S. 257, 41 S. Ct. 56, 3 A. F. T. R. 3095 (1921), an Appeal from a decision of the Court of Claims, the Supreme Court was called upon to interpret the provisions of §202(a) & (b) of the Revenue Act of 1916. The question presented was whether the Act imposed the Federal Estate Tax on a certain interest that passed under testamentary execution of a general power of appointment created prior, but executed subsequent to its passage. In the course of its opinion, which affirmed the decision of the Court of Claims in the taxpayer's favor, the Supreme Court said (41 S. Ct. 257):

“(1) No question being suggested as to the power of Congress to impose a tax upon the passing of property under testamentary execution of a power of appointment created before, but executed after, the passage of the taxing act (see *Chanier v. Kelsey*, 205 U. S. 466, 473, 478, 479, 27 Sup. Ct. 550, 51 L. Ed. 882; *Knowlton v. Moore*, 178 U. S. 41, 56-61, 20 Sup. Ct. 747, 44 L. Ed. 969), the case involves merely a question of the construction of the act. Applying the accepted canon that the provisions of such acts are not to be extended by implication (*Gould v. Gould*, 245 U. S. 151, 153, 38 Sup. Ct. 53, 62 L. Ed. 211), we are constrained to the

view notwithstanding the administrative construction adopted by the Treasury Department—that the Revenue Act of 1916 did not impose an estate tax upon property passing under a testamentary execution of a general power of appointment.”

The provisions of §202(b) of the Revenue Act of 1916 bear considerable similarity to those of §811(c) of the Internal Revenue Code of 1939. It is submitted that the District Court erroneously extended the provisions of §811(c)(1) of the Internal Revenue Code of 1939 by implication when it entered judgment against the present appellants on March 3, 1959.

The Circuit Court of Appeals, Ninth Circuit, applied the rule of *Gould v. Gould*, (*supra*), in the case of *Weaver Co. v. Commissioner of Internal Revenue*, 97 F. 2d 31, 34, 21 A. F. T. R. 310, 313, (1938) wherein a decision of the Board of Tax Appeals was reversed. The problem there presented to the Appellate Court was that of the interpretation of Sections of the Revenue Act of 1932 relating to the taxation of certain corporate liquidating dividends. The Circuit Court said:

21 A. F. T. R. 312-313:

“Fourth. The most that can be said for respondent is that it is doubtful whether §§22(d), 115(c) and 112, on the one hand, or §23(r)(1) on the other hand is applicable. The rule announced in *Gould v. Gould*, 245 U. S. 151, 152, 153, 38 S. Ct. 53, 62 L. Ed. 211, is applicable, we think, and is: ‘In case of doubt they (taxing statutes) are construed most strongly against the Government, and in favor of the citizen.’ Therefore, §23(r)(1) should be construed as not applicable to petitioner.”

It is submitted that this language has direct application to the determination of whether or not Elizabeth Beatrice Maclean made the presently disputed transfer in trust on January 12, 1923, as the Appellants contend, or on February 19, 1941, as the District Court has obviously decided. If the transfer occurred on the earlier date, it is not subject to Federal Estate Tax. If it took place when decedent's husband died on February 19, 1941, the corpus is taxable. In case of doubt taxing statutes are construed most strongly against the government and in favor of the citizen. *Gould v. Gould*, (*supra*.)

The United States District Court for the Southern District of California has not hesitated to apply the rule of the *Gould* case. In *Kern River Oilfields of California, LTD. v. Welch*, D. C. S. D. Calif. 15 A. F. T. R. 941 (1933) Judge Cosgrove said:

15 A. F. T. R. 942:

“The interpretation sought by the government would change a provision of a statute in which there is no ambiguity whatever. This may not be done. (*Gould v. Gould*, 245 U. S. 151, 38 S. Ct. 53, 62 L. Ed. 211 (3 Am. Fed. Tax Rep. 2958)).”

Judge Cosgrove was affirmed by the Ninth Circuit in the *Kern River Oilfields* case, 78 F. 2d 631, 16 A. F. T. R. 438 (1935).

Judge Yankwich, sitting for the District Court of Nevada, made vigorous application of the rule of the *Gould* case, *supra*, by his opinion in the case of *In re Owl Drug Co.*, 21 Fed. Supp. 907, 912, 20 A. F. T. R. 729, 734 (1937). The question before Judge Yankwich was one of the imposition of an income tax upon certain income of a Trustee in Bankruptcy. The tax claim was

dissallowed. In support of this action Judge Yankwich said:

21 Fed. Supp. 912, 20 A. F. T. R. 734:

“This is a specific limitation. We must give effect to it. To read into it the unlimited definition of “income” applying in the case of persons other than the named fiduciaries, is to destroy the limitation. No tax can be imposed by implication, or by judicial construction. We are bidden to interpret tax statutes strictly against the Government, and to resolve in favor of the taxpayer doubts as to the fact of the imposition of a tax, and the amount of it. See *Gould v. Gould* (1917) 245 U. S. 151, 38 S. Ct. 53, 62 L. Ed. 211; *Crooks v. Harrelson* (1930) 282 U. S. 55, 51 S. Ct. 49, 75 L. Ed. 156; *Cole v. Commissioner* (C. C. A. 9, 1935) 81 F. (2d) 485, 487, 104 A. L. R. 420; *Commissioner v. Bryn Mawr Trust Co.* (C. C. A. 3, 1936) 87 F. (2d) 607, 611. To do away with the limitation would mean going in the face of this salutary policy.”

It is submitted that §811(c)(1)(B) of the *Internal Revenue Code of 1939* is a specific limitation. It was necessary for the District Court to destroy this limitation by reading into the plan words “transfer made before March 3, 1931” the word “irrevocable” in order to arrive at the judgment entered on March 3, 1959. Statutes imposing a tax are interpreted strictly against the Government and doubts as to the imposition of a tax are resolved in favor of the taxpayer.

This Court is simply called upon to decide whether Elizabeth Beatrice Maclean transferred the property giving rise to the disputed estate tax on January 12, 1923,

or made that transfer by the medium of her husband's death on February 19, 1941. If she transferred the property by her husband's death on February 19, 1941, the District Court's judgment of March 3, 1959, should be affirmed, but if she transferred the property on January 12, 1923, the District Court's judgment of March 3, 1959 should be reversed and the tax refunded with interest.

In summary it is submitted:

1. The words "a transfer made before March 4, 1931" are so plain and unambiguous as to clearly exclude the corpus transferred to the Elizabeth Beatrice Maclean trust on January 12, 1923, from her gross estate under the provisions of *Section 811(c)(1)(B) of the Internal Revenue Code of 1939*.

2. If there is any doubt as to whether the words "shall not apply to a transfer made before March 4, 1931," used in §811(c)(1) of the Internal Revenue Code of 1939 serve to exclude the corpus transferred to the Elizabeth Beatrice Maclean trust on January 12, 1923 from her gross estate, that doubt must, on the authority of *Gould v. Gould, supra*, be resolved against the Government, and the corpus of the Maclean trust excluded from decedent's gross estate.

Conclusion.

It is respectfully submitted that the District Court's judgment of March 3, 1959, should be reversed with instructions that judgment be entered for the Appellants.

ERNEST R. MORTENSON,

Attorney for Appellants.

Dated: 9th day of October, 1959.







APPENDIX A.

Statutes Involved.

Section 811(c)(1)(B) Internal Revenue Code of 1939:

“Sec. 811. Gross Estate

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(c) Transfers in Contemplation of, or Taking Effect at, Death.—

(1) General rule.—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise—

(A) in contemplation of his death; or

(B) under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (i) the possession or enjoyment of, or the right to the income from, the property, or (ii) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; or”

“Subparagraph (B) shall not apply to a transfer made before March 4, 1931; nor shall subparagraph (B) apply to a transfer made after March 3, 1931, and before June 7, 1932, unless the property transferred would have been includible in the decedent's gross estate by reason of the amendatory language of the joint resolution of March 3, 1931 (46 Stat. 1516.)”

Joint Resolution of Congress of March 3, 1931, 46 State. 1516:

“Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the first sentence of subdivision (c) of Section 302 of the Revenue Act of 1926 is amended to read as follows:

‘(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money’s worth.”

**In the United States Court of Appeals
for the Ninth Circuit**

**ALAN D. MACLEAN AND FRANCIS D. MACLEAN
APPELLANTS**

v.

UNITED STATES OF AMERICA, APPELLEE

**On Appeal From the Judgment of the United States
District Court for the Southern District of California**

BRIEF FOR THE APPELLEE

CHARLES K. RICE,
Assistant Attorney General.

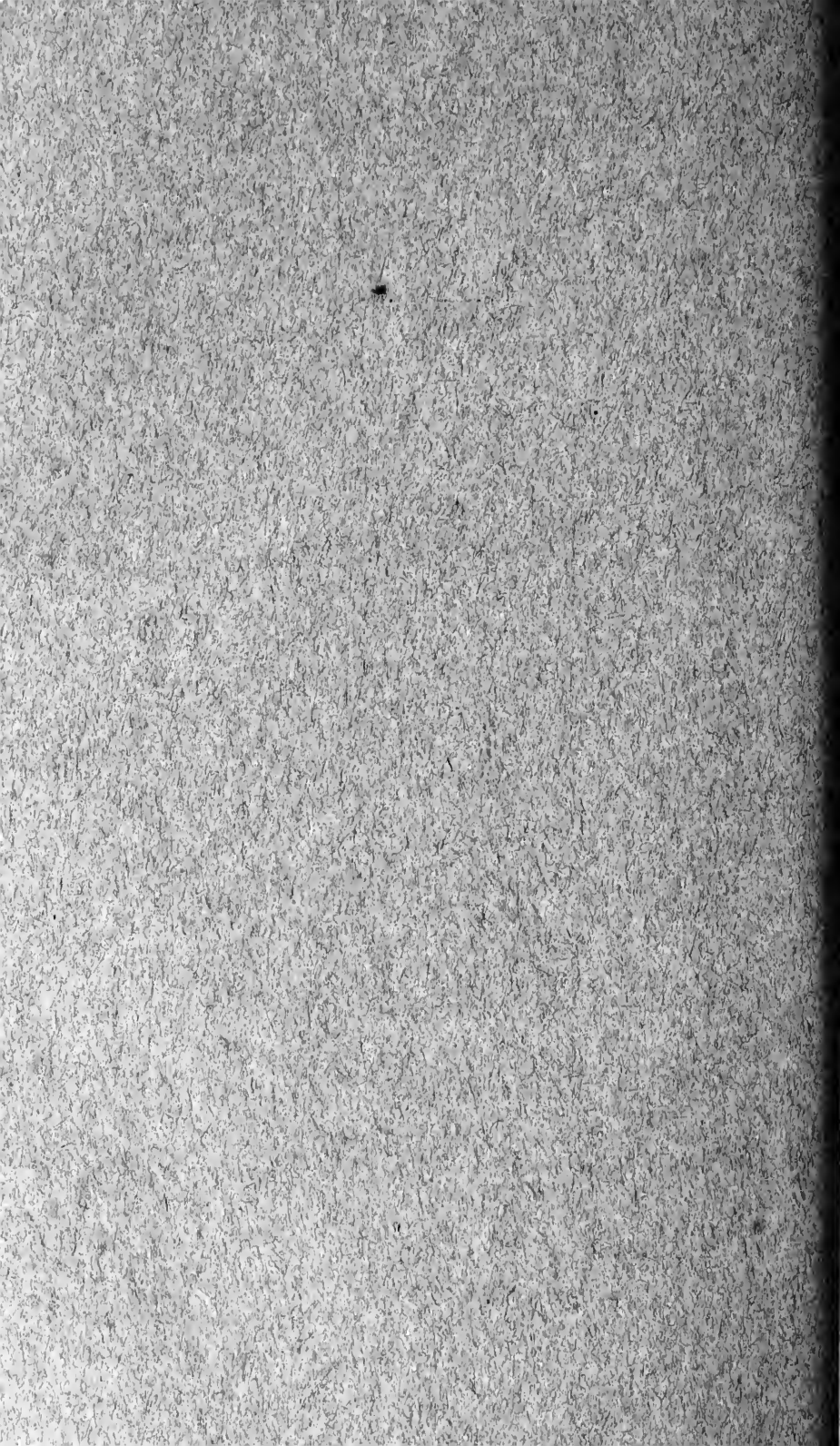
**LEE A. JACKSON,
I. HENRY KUTZ,
HELEN A. BUCKLEY,**
*Attorneys,
Department of Justice,
Washington 25, D. C.*

LAUGHLIN E. WATERS,
United States Attorney.

E. R. MCHALE,
Assistant United States Attorney.

FILED

NOV 16 1959



I N D E X

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	4
Summary of argument.....	6
Argument:	
I. The trust established by decedent on May 27, 1931, was a new trust and as such must be included in decedent's gross estate as a transfer made subsequent to March 3, 1931.....	8
II. Since the trust was revocable until 1941, the decedent did not make a "transfer" within the meaning of the Code prior to March 4, 1931	16
Conclusion	23

CITATIONS

Cases:

<i>Burnet v. Guggenheim</i> , 288 U.S. 280.....	22
<i>Burnet v. Northern Trust Co.</i> , 283 U.S. 782.....	17
<i>Commissioner v. Estate of Church</i> , 335 U.S. 632..	17, 19, 20
<i>Cuddihy, Estate of v. Commissioner</i> , 32 T.C. No. 110	22
<i>Hassett v. Welch</i> , 303 U.S. 303.....	18
<i>Helvering v. Bullard</i> , 303 U.S. 297.....	11
<i>May v. Heiner</i> , 281 U.S. 238.....	17, 18, 19, 20, 21
<i>McCormick v. Burnet</i> , 283 U.S. 784.....	17
<i>Morsman v. Burnet</i> , 283 U.S. 783.....	17
<i>Reinecke v. Northern Trust Co.</i> , 278 U.S. 339....	18, 20, 21
<i>Sanford, Estate of v. Commissioner</i> , 308 U.S. 39..	21
<i>Smith v. United States</i> , 139 F. Supp. 305.....	17, 20, 21
<i>Webster v. Commissioner</i> , 38 B.T.A. 273.....	11

II

Statutes:	Page
Act of October 25, 1949, c. 720, 63 Stat. 891, Sec. 7(b)	18
Internal Revenue Code of 1939, Sec. 811 (26 U.S.C. 1952 ed., Sec. 811).....	2
Joint Resolution of March 3, 1931, c. 454, 46 Stat. 1516	4
Miscellaneous:	
Rev. Rul. 277, 1953-2 Cum. Bull. 265.....	17
S. Rep. No. 831, 81st Cong., 1st Sess., pp. 7-8 (1949-2 Cum. Bull. 289, 293-294).....	19

**In the United States Court of Appeals
for the Ninth Circuit**

No. 16472

ALAN D. MACLEAN AND FRANCIS D. MACLEAN
APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

On Appeal From the Judgment of the United States
District Court for the Southern District of California

BRIEF FOR THE APPELLEE

OPINION BELOW

The findings of fact, conclusions of law and judgment (R. 26-32) are not formally reported.

JURISDICTION

This appeal involves federal estate taxes. The amount in dispute, \$69,045.27 tax, plus \$8,630.66 interest for a total of \$77,675.93, was paid on August 15, 1957. (R. 15.) Claim for refund was filed on September 3, 1957 (R. 15, 29), and was rejected on March 15, 1958 (R. 15-16). Within the time pro-

vided in Section 3772 of the Internal Revenue Code of 1939, and on May 28, 1958, the taxpayers brought an action in the District Court for the recovery of the taxes and interest paid. (R. 3-11.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1346. The judgment was entered on March 13, 1959. (R. 26-32.) Within sixty days and on March 19, 1959, a notice of appeal was filed. (R. 32.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTIONS PRESENTED

1. Whether the District Court properly found that the trust established by decedent on May 27, 1931, was a new trust and as such must be included in her gross estate as a transfer made subsequent to March 3, 1931.

2. Where a trust was revocable until 1941, whether the District Court properly found that the decedent did not make a "transfer" within the meaning of the Internal Revenue Code prior to March 4, 1931.

STATUTES INVOLVED

Internal Revenue Code of 1939:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(c) [as amended by Sec. 7(a), Act of October 25, 1949, c. 720, 63 Stat. 891] *Transfers in Contemplation of, or Taking Effect at, Death.*—

(1) [as amended by Sec. 207, Technical Changes Act of 1953, c. 512, 67 Stat. 615] *General rule.*—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise—

* * * *

(B) under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (i) the possession or enjoyment of, or the right to the income from, the property, or (ii) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom;

* * *

* * * *

Subparagraph (B) shall not apply to a transfer made before March 4, 1931; nor shall subparagraph (B) apply to a transfer made after March 3, 1931, and before June 7, 1932, unless the property transferred would have been includible in the decedent's gross estate by reason of the amendatory language of the joint resolution of March 3, 1931 (46 Stat. 1516).

* * * *

(26 U.S.C. 1952 ed., Sec. 811.)

Joint Resolution of March 3, 1931, c. 454, 46 Stat. 1516:

Chap. 454.—Joint Resolution To amend section 302 of the Revenue Act of 1926.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the first sentence of subdivision (c) of section 302 of the Revenue Act of 1926 is amended to read as follows:

“(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money’s worth.”

STATEMENT

The findings of fact of the District Court (R. 27-29) were based upon the pleadings (R. 3-13), stipulations of facts and the exhibits attached thereto (R. 13-26). The facts are as follows:

This is an action for the refund of federal estate taxes brought by the appellants (hereafter taxpay-

ers) who are the executors of the estate of Elizabeth Beatrice Maclean, deceased. The decedent died testate on February 20, 1954. (R. 27.) The question involved in this case is the includibility in decedent's gross estate of a certain trust.

On January 12, 1923, the decedent as trustor created a trust (Ex. A, R. 16-20) wherein her husband, John Alexander Maclean, was named trustee. The entire net income of the trust estate, consisting of securities, was reserved to decedent for her life. In addition, decedent reserved the right to revoke the trust during the life of her husband with his consent. (R. 27-28.)

On May 27, 1931, by written document (Ex. B, R. 20-21), the decedent expressly revoked the above trust. This revocation was made in pursuance of, and in compliance with, the right of revocation contained in the trust indenture of January 12, 1923. Then on the same date, May 27, 1931, decedent created a new trust (Ex. C, R. 21-25) wherein she reserved to herself for her life the entire net income of the trust estate, consisting of securities transferred from the revoked trust. The new trust differed substantially in its terms from the revoked trust, and it constituted a separate, distinct and different trust from the revoked trust. It was not a continuation in modified form of the revoked trust. (R. 28.)

The new trust was revocable by the decedent, with the consent of her husband, until his death on February 19, 1941, at which time it became irrevocable. (R. 28-29.) The new trust was in existence at the

date of decedent's death on February 20, 1954. (R. 29.)

The taxpayers, as executors, filed an estate tax return showing no tax due and payable. Thereafter, the District Director of Internal Revenue at Los Angeles, California, assessed a deficiency, and the taxpayers paid the sum of \$77,675.93 for estate taxes and interest. (R. 29.) They filed an action for the refund of this sum plus interest, judgment was entered against them, and from such judgment they here appeal.

SUMMARY OF ARGUMENT

The only question in this case is whether decedent made a transfer of certain trust property before March 4, 1931, within the meaning of Section 811 (c) (1) (B) of the Internal Revenue Code of 1939. The two trust agreements differ in considerable respect. The 1923 trust provided that income was to go to decedent for life, upon her death the trust was to cease and all trust assets were to go to her husband. On the other hand, the trust indenture of May 27, 1931, not only named a new trustee but it also changed the beneficial interests in the trust. In the 1931 trust the decedent still retained the income for life, but thereafter the net income was to go to her husband for his life, the remainder to be held for the benefit of her two sons for life and upon their death was to be subject to their testamentary disposition, or lacking such distribution, to their surviving descendants per stirpes. Thus the two trusts

were completely different insofar as the remainder interests were concerned. The 1931 trust, which was still in existence at the time of decedent's death, was not the result of a transfer made before March 4, 1931. Through express revocation of the first instrument of 1923, decedent obtained once more complete and untrammelled dominion over the corpus; decedent used this dominion to direct the transfer of the trust corpus by her husband, trustee under the 1923 trust, to the Northern Trust Company, trustee under the new 1931 indenture, differing, as stated, in numerous respects. If the Court agrees with the Government's argument that the May 1931 indenture created a new trust, then, without more, the corpus of the trust is includible in the decedent's gross estate by reason of the amendatory language of the Joint Resolution of March 3, 1931, and Section 811(c)(1)(B), as amended, of the 1939 Code, since she retained the income of the property for life.

Additionally, it is clear from the decided cases and the legislative history surrounding the 1949 amendment to Section 811(c)(1)(B) which first provided that transfers made prior to March 4, 1931, were not includible in gross estate, that no transfer within the meaning of the statute took place in the instant case until the date on which the trust became irrevocable, February 19, 1941, the date of the death of decedent's husband. Hence, the corpus of the trust at the date of decedent's death was includible in her gross estate on a second ground, namely, as a transfer made on February 19, 1941, the date the trust became irrevocable.

ARGUMENT

I

**The Trust Established By Decedent On May 27, 1931,
Was A New Trust and As Such Must Be Included
In Decedent's Gross Estate As A Transfer Made
Subsequent To March 3, 1931**

It is the position of the Government that the corpus of the trust in question is includible in the gross estate of decedent under the provisions of Section 811(c) (1) (B) of the Internal Revenue Code of 1939, as amended, *supra*. That section provides for the inclusion in gross estate of all property of a decedent—

(B) under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (i) the possession or enjoyment of, or the right to the income from, the property, or (ii) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; * * *

There is no controversy about the fact that the retention of income for life by the decedent in the instant case fits within the above language. However, the section goes on to provide that—

Subparagraph (B) shall not apply to a transfer made before March 4, 1931; nor shall subparagraph (B) apply to a transfer made after March 3, 1931, and before June 7, 1932, unless the property transferred would have been includible in the decedent's gross estate by reason of

the amendatory language of the joint resolution of March 3, 1931 (46 Stat. 1516).

The facts in this case make it clear that a "transfer" within the meaning of Section 811(c) was made by decedent after March 3, 1931, on either of two grounds.

An examination of the two trust agreements shows that the second agreement, dated May 27, 1931, is not a mere continuation of the earlier agreement of January 12, 1923, but rather is a completely new trust. The 1923 agreement (Ex. A, R. 16-20) conveyed to the trustee, decedent's husband, John Alexander Maclean, various securities. The entire net income from the trust was to be paid to decedent during her life, with the trust to cease upon her death predeceasing her husband, all trust assets going to her husband. Should decedent outlive her husband, then the trust was to cease upon her death, the trust assets subject to her testamentary disposition, lacking such disposition, to her descendants then living, per stirpes. It is important to note that in the trust instrument decedent expressly reserved the right to revoke the trust during the life of her husband with his consent. (R. 18-19.) The trustee was given broad discretion in regard to the trust assets with full power to invest, sell and convey. His investments were not restricted to investments fixed by the state laws. (R. 17.)

Acting under her reserved right to revoke the 1923 trust agreement with the consent of her husband, decedent elected to do so on May 27, 1931, and on that date directed her husband as trustee "to trans-

fer all of the property now held under said trust to a new trust created by the undersigned Elizabeth Beatrice Maclean with The Northern Trust Company, Trustee". (Ex. B, R. 20-21.) This new trust, hereafter termed the 1931 trust, differed from the 1923 trust in several rather important particulars. The most significant change of all related to the disposition of the trust corpus after the death of decedent. The 1931 trust, as the 1923 trust, provided that net income was to go to decedent for life. Thereafter, while the 1923 trust provided for the dissolution of the trust with all trust assets to go to decedent's husband, the 1931 trust made the following disposition of the remainder interest: net income to decedent's husband for life, remainder to be held for the benefit of two sons for life, each portion thereupon to be subject to the sons' testamentary disposition or lacking such disposition to his surviving descendants per stirpes. (R. 22-23.) Thus the two trusts were different insofar as the remainder interests were concerned.¹ In directing her trustee to transfer the trust assets to the new trustee on May 27, 1931, and in executing the new trust indenture on that same date, the decedent made a transfer in which she retained for her life the right to income. It is obvious that such a transfer was not made before March 4, 1931, and that therefore the trust property is includible in decedent's gross estate under Section 811(c)(1)(B), as amended, of the 1939 Code and

¹ Also the new trust provided that sales made by the trustee were to be approved by decedent (R. 22), whereas the earlier trust contained no such requirement.

under the Joint Resolution of March 3, 1931, *supra*.

While the question of whether or not a new trust was formed is primarily a factual matter which must be determined by considering the trust instruments involved, it is interesting to note that the Supreme Court has considered a situation somewhat analogous to that at bar. In *Helvering v. Bullard*, 303 U.S. 297, the decedent transferred in 1927 certain securities by irrevocable deed to her son in trust, reserving the income to herself for life, with various remainder interests. In 1931 dissatisfaction with the administration of the trust impelled the decedent to seek its abrogation on the ground that it violated the rule against perpetuities. Eventually, a compromise agreement was entered into by the decedent and the adult beneficiaries, whereby a decree was entered in favor of the decedent in consideration of her execution of a new trust. This she did on February 17, 1932, once again reserving to herself a life interest. The decedent died in 1933, and it was the position of her representatives that the 1932 transfer had no independent existence and that in legal effect the trust in that year stemmed from the 1927 instrument. The Supreme Court held, however, to the contrary, and included the trust property in the decedent's gross estate as a transfer made after March 3, 1931. The Board of Tax Appeals likewise found to similar effect in *Webster v. Commissioner*, 38 B.T.A. 273, where a decedent created a trust in 1929 consisting of securities, reserving the income for her life. Pursuant to a power of revocation contained in the 1929 agreement, she

revoked the trust to the extent of fifty percent of the market value of the securities in 1932. On July 12, 1932, she created another trust using the withdrawn securities as the corpus. In *Webster*, as in *Bullard* and as in the case at bar, the taxpayer's argument was that the later trust was no more than a continuation of the pre-March 4, 1931, trust. In rejecting this argument, the Board of Tax Appeals stated (p. 280):

We think that this contention is not sound. The 1929 trust differed somewhat in its terms from the 1932 trust, as indicated by the respective paragraphs of the trusts quoted in the findings of fact. * * * When decedent withdrew securities from the 1929 trust they became her property to do with as she desired. The property withdrawn was conveyed to a new trust. Whatever remainder interest Baronig Baron had received in these securities under the 1929 trust when it was created was divested when decedent withdrew the securities from the 1929 trust. It is immaterial that Baronig Baron, the beneficiary of the 1929 trust, was made the beneficiary of the 1932 trust. He might not have been made the beneficiary and might not have received again a remainder interest in the securities that had been withdrawn from the 1929 trust. We hold that the 1932 trust was a new trust, created July 12, 1932. * * * Clearly, the 1932 trust, involving transfers made subsequent to March 3, 1931, comes within the provisions of [the Joint Resolution of 1932].

An even stronger case supporting the position that the 1931 trust was a new trust is present in the

case at bar where there was a change of beneficiaries in the later trust indenture.

When decedent expressly elected to revoke the 1923 trust, with her husband's consent, in accordance with the right specifically reserved in the 1923 indenture (R. 19), she plainly obtained full dominion over the trust corpus; it became her absolute property with complete power of disposition to do with it as she pleased and as if there never had been any 1923 trust at all. The instrument of revocation, executed in May, 1931, recognized this to be the situation for in it she expressly directed her husband as trustee under the 1923 trust to dispose of the property in the manner in which she chose, namely, "to transfer all of the property now held under said trust to a *new* trust created by the undersigned Elizabeth Beatrice Maclean with The Northern Trust Company, Trustee, of even date herewith" (*italics supplied*). (Ex. B, R. 20.) Thus, on the basis of these facts alone, the transfer from decedent involved in the creation of the May 1931 trust was made after March 3, 1931, and, therefore, the corpus of this new trust is properly includible in decedent's gross estate under the provisions of Section 811(c)(1)(B) of the 1939 Code and the amendatory language of the Joint Resolution.

But taxpayers' sole response to these record facts and the legal conclusions following from them is an assertion (Br. 6) that "The Government is in no position to contend on the record that May 27, 1931, is the correct answer to the question posed". The explanation afforded for this contention is (Br. 6) that "Appellants and Appellee have stipulated as a

fact this transfer was made by the trustee rather than the decedent. * * * Stipulation of Fact No. V, T R 15 eliminates the possibility that the decedent made the transfer on May 27, 1931. John Alexander Maclean made that transfer to the Northern Trust Company, Trustee * * *."

True, it is stipulated (R. 15) that—

The corpus of said Trust created January 12, 1923, was transferred by John Alexander Maclean, Trustee, to the Northern Trust Company, Trustee, on May 27, 1931.

But this fact must be read in the light of all of the instruments likewise stipulated, including the instrument of revocation of the 1923 trust. (R. 14-15, 20-21.) Thus, it is apparent that although physically the corpus of the 1923 trust was transferred by decedent's husband to the new trustee, this was done pursuant to the express direction contained in the instrument of revocation (R. 20) wherein she, with his approval, "hereby directs" him "as Trustee" under the 1923 trust to "transfer all of the property" held under the 1923 trust to "*a new trust created by the undersigned Elizabeth Beatrice Maclean with The Northern Trust Company, Trustee*" (italics supplied). The trustee-husband under the 1923 trust having legal title to the corpus conveyed that title to the new trustee, but this he did as a result of her express command; in so doing, he acted merely as her agent or instrument and the transfer and the creation of the new May 1931 trust was in every true sense made by decedent.

Furthermore, the written arguments in the District Court demonstrate that it is in this Court for the first time that taxpayers are asserting that the Government is in no position to contend on the record that May 27, 1931, was the date of the transfer. Indeed, the briefs submitted below establish that this issue was fully argued by both sides and, moreover, was considered and decided by the District Court. Thus, the District Court found that on May 27, 1931, decedent expressly revoked the 1923 trust, that by the indenture of May 27, 1931, decedent on that date created a new trust, that the new trust substantially differed in terms from the revoked trust and constituted a separate and distinct trust from the revoked trust, that the trust was not a continuation in modified form of the revoked trust. (R. 28.) Further, in its conclusions of law (R. 30), the District Court held that taxpayers had not sustained their burden of proving that the trust in existence at the date of the decedent's death was the result of a transfer made before March 4, 1931, that "The trust of May 27, 1931, constituted a new, separate, distinct, and different trust from the revoked trust of January 12, 1923", and "Said new trust was not a continuation in modified form of said revoked trust".

The Government's position was thus two-fold below and it is the same in this Court, namely, that the transfer occurred either on May 27, 1931, when the new trust was set up or on February 19, 1941, when the new trust became irrevocable by reason of

the death of decedent's husband. See point II, *infra*. Both contentions were plainly made and decided below; neither has been waived here or in the court below. No reason is presented why the Government should have waived the position fully sustained by the record that at the earliest the transfer occurred with the setting up of the new trust in May 1931. The conclusion follows that if either contention of the Government be sustained, the transfer is taxable, since the decedent reserved to herself for life the entire net income of the trust resulting from a transfer subsequent to March 3, 1931.

II

Since the Trust Was ^CRevo~~cy~~able Until 1941, the Decedent Did Not Make A "Transfer" Within the Meaning of the Code Prior To March 4, 1931

Additionally, it is our position that a conveyance in trust which is revocable is not a "transfer" within the meaning of Section 811(c)(1)(B) as amended by the Act of October 25, 1949 (Technical Changes Act of 1949) until such transfer becomes irrevocable. It should be noted that in the case at bar both the 1923 and the 1931 trust indentures provided that the trusts were revocable by decedent with the consent of her husband, John Alexander Maclean. It was not until decedent's husband died on February 19, 1941, that the 1931 trust became irrevocable. (R. 25, 28-29.) Therefore, not until that date was there a "transfer" within the meaning of Section 811(c). The Court of Claims, two judges dissenting, has held to this precise effect in a well-reasoned decision in

Smith v. United States, 139 F. Supp. 305. This decision, which gives careful attention to the history leading up to the various amendments, has come to the correct conclusion and we believe that the same result should obtain in the instant case. See also Rev. Rul. 277, 1953-2 Cum. Bull. 265.

Section 302(c) of the Revenue Act of 1926, c. 27, 44 Stat. 9, the predecessor of Section 811(c), originally required the inclusion in gross estate of property as to which the decedent had made a transfer "intended to take effect in possession or enjoyment at or after his death." In *May v. Heiner*, 281 U.S. 238, the Supreme Court held that property which the decedent had conveyed irrevocably, but in which he had retained a life interest, was not a transfer intended to take effect in possession or enjoyment at or after his death. One of the crucial points in the *May v. Heiner* holding was the finding of the Supreme Court that no interest in the corpus passed at the settlor's death because legal title had passed from the settlor *irrevocably* when the trust was executed. This decision, which the Supreme Court later stated upset "the century-old historic meaning and the long standing Treasury interpretation of the 'possession or enjoyment' clause" (*Commissioner v. Estate of Church*, 335 U.S. 632, 639), was quickly followed by that Court in three *per curiam* opinions.² Immediately thereafter the Joint Resolution of 1931 was enacted by Congress in order to correct the situation brought about by these decisions. The amend-

² *Burnet v. Northern Trust Co.*, 283 U.S. 782; *Morsman v. Burnet*, 283 U.S. 783; *McCormick v. Burnet*, 283 U.S. 784.

ment effected by the Joint Resolution made it clear that transfers with a retained life interest were to be included in gross estate. However, it is important to note that *May v. Heiner* concerned an irrevocable trust, and the Supreme Court, in an earlier case, *Reinecke v. Northern Trust Co.*, 278 U.S. 339, had held includible in gross estate a trust in which the grantor had reserved a life estate and, in addition, retained a power to revoke the transaction. Therefore, a trust such as that at bar, wherein decedent had a right to revoke the trust, would have been includible in gross estate both before and after the decision in *May v. Heiner*, if at the time of death the trust was still revocable. Thus the Joint Resolution was not aimed at including transfers with retained life estates where the transfer was revocable, since the Supreme Court in *Reinecke v. Northern Trust Co.*, *supra*, had already held such trusts includible within gross estate.

When Congress passed the Act of October 25, 1949 (Technical Changes Act of 1949), Section 7(b), which provided that transfers made before March 4, 1931, would not be included in gross estate, they made it clear that their intention was to honor the expectations of those who had arranged, or had refrained from rearranging their property affairs in reliance upon interpretations placed upon the earlier statutes by the Supreme Court in *May v. Heiner* and in *Hassett v. Welch*, 303 U.S. 303, 307, wherein that Court held that the Joint Resolution was not retroactive "in respect of past irrevocable transfers with reservation of a life interest." The necessity for the

1949 amendment arose out of the Supreme Court's overruling in that year of the *May v. Heiner* doctrine. In *Commissioner v. Estate of Church, supra*, the decedent executed an irrevocable trust in 1924, reserving to himself the income for life. The Court specifically overruled *May v. Heiner* and held (p. 639) that the retention of a life estate was a transfer "intended to take effect in * * * enjoyment at * * * his death" and without relying upon the amending language of the Joint Resolution of 1931 held the value of the corpus includible in the decedent's gross estate. Congress thereupon amended the section to exclude from gross estate those transfers made prior to the time of the Joint Resolution in 1931. Just what Congress intended to accomplish by this amendment is made plain in S. Rep. No. 831, 81st Cong., 1st Sess., pp. 7-8 (1949-2 Cum. Bull. 289, 293-294):

In the joint resolution of March 3, 1931, Congress created a new estate tax rule with respect to transfers after March 3. It left unchanged the rule in effect for transfers before that date. It is the opinion of your committee that the old rule should have been continued in effect with respect to such transfers until changed by legislation. Since the rule has been changed by the Supreme Court in the *Church* opinion, your committee believes that the Congress should act to restore the estate tax law to what it was prior to the *Church* opinion.

Some persons might have surrendered their life estates after 1931 had they not relied on the interpretation of the estate tax law which has now been overruled and in some cases con-

siderable hardship may result from application of the new interpretation presented in the Church case. It is the opinion of your committee that after all of these years these persons are entitled to rely upon the long standing interpretation in *May v. Heiner*, and the proposed amendment is accordingly intended to assure that result.

Thus, as the Court of Claims stated in *Smith v. United States*, *supra*, p. 309, from the above-quoted language it is obvious that Congress meant to restore to pre-1931 transactions the tax status which they had from the time of the decision in *May v. Heiner* in 1930 to that of the decision in *Estate of Church* in 1949. And it is also clear that by the amendment Congress did not intend to exempt from taxation property which had never before been exempt under *May v. Heiner*. In the present case, because of decedent's retention of the power of revocation, the trust corpus would have been included in her gross estate both before and after *May v. Heiner*. The 1949 amendment, excluding transfers made prior to March 4, 1931, obviously then did not intend to cover decedent's situation. She could not have properly relied upon the *May v. Heiner* case in view of the earlier case of *Reinecke v. Northern Trust Co.*, *supra*, wherein it was made quite clear that the retention of a life estate along with the power of revocation in the trustor would suffice to include the trust in gross estate. In the case at bar it was not until 1941, when decedent's husband died, that she finally had a trust situation which would fall within the cover-

ing language of *May v. Heiner*. And, we submit, it was not until that date, 1941, that decedent accomplished the type of transfer contemplated by Congress in the 1949 amendment. *Smith v. United States, supra*. But 1941 is too late, and transfers made then are clearly includible in gross estate.

In support of our interpretation of the word "transfer", which we submit is the only interpretation which can give effect to the legislative intent behind the 1949 amendment, we refer to the decision of the Supreme Court in *Reinecke v. Northern Trust Co., supra*. In that case one of the contentions made was that since the trusts in question were created long before the passage of any statute imposing an estate tax, the taxing statute if applied to them was unconstitutional and void because retroactive. In reaching this point, the Supreme Court stated (p. 345):

But in *Chase National Bank v. United States*, decided this day, *ante*, p. 327, the decision is rested on the ground, earlier suggested with respect to the Fourteenth Amendment in *Saltonstall v. Saltonstall*, 276 U.S. 260, 271, that a transfer made subject to a power of revocation in the transferor, terminable at his death, is not complete until his death. Hence § 402, as applied to the present transfers, is not retroactive, since his death followed the passage of the statute.

Likewise, in *Estate of Sanford v. Commissioner*, 308 U.S. 39, the Court was concerned with the statute imposing a tax upon the transfer of property by gift.

There, too, the conveyance in question was made before the enactment of the statute, but it contained a power of revocation which was not relinquished until after the enactment date. The Court held that the "transfer" contemplated by the statute occurred, not when the title passed, but when the title became irrevocable. To like effect was the earlier decision in *Burnet v. Guggenheim*, 288 U.S. 280. And so too, in the case at bar. The transfer did not take place when the title passed, but rather when the passage of title became irrevocable. Thus the transfer here did not take place until February 19, 1941.

Taxpayer places much reliance on and quotes at length from the Tax Court decision in *Estate of Cuddihy v. Commissioner*, 32 T.C. No. 110. In the *Cuddihy* case, which the Tax Court found factually distinguishable from *Smith*, the decedent had a right to terminate the trust with the consent of at least four of his seven children, and then the termination was only in favor of decedent's children. There was no way by which decedent could recover the property. This is, of course, completely different from the instant case where decedent had the right to revoke the trust for her own benefit, and needed only the consent of her husband (whose possible adversity of interest could in any event be no more than that of a second life tenant).

The corpus of a trust in which a life interest is retained which is not transferred until February 19, 1941, as in the case at bar, is clearly includible within the gross income of decedent under Section 811

(c) (1) (B) of the 1939 Code, and the District Court correctly so held.

CONCLUSION

The holding of the District Court that the trust corpus was includible in decedent's gross estate is correct on either of the two grounds stated above and should be affirmed.

Respectfully submitted,

CHARLES K. RICE,
Assistant Attorney General.

LEE A. JACKSON,
I. HENRY KUTZ,
HELEN A. BUCKLEY,
Attorneys,
Department of Justice,
Washington 25, D. C.

LAUGHLIN E. WATERS,
United States Attorney.

E. R. MCHALE,
Assistant United States Attorney.

NOVEMBER, 1959.

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No. 16472

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALAN D. MACLEAN and FRANCIS D. MACLEAN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' REPLY BRIEF.

ERNEST R. MORTENSON,
961 East Green Street,
Pasadena, California,
Attorney for Appellants.

FILED

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PAUL P. O'BRIEN, CLERK



TOPICAL INDEX

PAGE

Argument	1
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I.

The Government's brief assumes that because the decedent purported to establish a trust on May 27, 1931, by modifying the trust previously created by her on January 12, 1923, she transferred the corpus of the pre-existing trust on the latter date.....	1
---	---

II.

Second division of the Government's argument takes the position that the death of Elizabeth Beatrice Maclean's husband on February 19, 1941, amounted to her making a transfer in trust on that date of the corpus here involved....	5
--	---

Conclusion	10
------------------	----

TABLE OF AUTHORITIES CITED

CASES	PAGE
Bullard v. Helvering, 303 U. S. 297.....	2
Estate of Sanford v. Commissioner, 308 U. S. 39.....	8, 9
Gould v. Gould, 245 U. S. 151, 38 S. Ct. 53, 3 A. F. T. R. 2958, affirm'g 168, App. Div. 900, 152 N. Y. Supp. 1144.....	10
Reinecke v. Northern Trust Company, 278 U. S. 339.....	5, 6, 7, 10
Webster v. Commissioner, 38 B. T. A. 273.....	2
STATUTE	
Internal Revenue Code of 1939, Sec. 811(c)(1).....	2

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ARGUMENT.

I.

The Government's Brief Assumes That Because the Decedent Purported to Establish a Trust on May 27, 1931 by Modifying the Trust Previously Created by Her on January 12, 1923, She Transferred the Corpus of the Pre-Existing Trust on the Latter Date.

There is no evidence in the record before the Court to support a finding that decedent made a transfer to the trust on May 27, 1931. On the contrary, it is stipulated that the trustee made the transfer [Tr. 15, Stip. V] and the Court found the *corpus* of the trust to have remained the same throughout [Tr. 28, Find. VI]. There is no evidence that he made this transfer solely because his wife so requested. The fact that she concurred in his decision

does not suffice to sustain the Government's contention that she made a transfer subsequent to March 3, 1931.

The case of *Bullard v. Helvering* (1938), 303 U. S. 297 (cited page 11 of the Government's Brief) involved an original 1927 transfer that was void *ab initio* because it was made in violation of the rule against perpetuities. It was no transfer at all since it was void from the beginning. The first valid transfer in the *Bullard* case was admittedly made by the decedent in 1932. In the Maclean trust it has not only been stipulated, but found by the District Court, that Elizabeth Beatrice Maclean made a valid transfer in trust on January 12, 1923. No Court decree has ever held that the Maclean trust was void *ab initio*. Therein lies the distinction between the present case and the *Bullard* case. The present decedent made a valid transfer before March 3, 1931. The decedent in the *Bullard* case made a void and invalid transfer prior to that date. It is submitted that the analogy between these cases, which the Government attempts to draw at page 11 of its Brief, is actually non-existent when the facts of the two cases are clearly understood.

The Board of Tax Appeals in *Webster v. Commissioner*, 38 B.T.A. 273 (cited at page 11 of the Government Brief) is likewise distinguishable. In that case the grantor of the 1929 trust appears to have had the sole power of revocation which she exercised to the extent of 50% of the market value of the securities found in the trust in 1932. She personally withdrew the securities from the 1929 trust and they became her property to do with as she desired. In the Maclean trust no property was withdrawn by the grantor but at all times remained in the hands of the trustee. We maintain that §811(c)(1) of the Internal Revenue Code of 1939 concerns itself with

the *transfer* of trust corpus and the question of whether or not there has been a change of beneficiaries is of no significance.

There is no question about the fact that Elizabeth Beatrice Maclean did concur in the action of John Alexander Maclean in his transfer of the corpus of the trust to the Northern Trust Company, the alternate trustee, on May 27, 1931. It is stipulated that he did make the transfer, as trustee. The District Court found as a fact [Tr. 28, Find. VI] that the trust estate of the trust indenture of May 27, 1931 consisted "of securities transferred from said revoked trust." The grantor of the trust of January 12, 1923, and the trustee thereunder were admittedly in accord about the latter's transfer of the trust corpus. The grantor merely ratified the trustee's act when she directed him to make the transfer to the alternate trustee. There is nothing in the record to show that the grantor compelled the trustee to make this transfer or that she had any power to compel him so to do. The Government's Brief (pp. 13, 14 and 15) deals lightly with the role and powers of trustee, John Alexander Maclean in the transfer of the corpus on May 27, 1931, to the alternate trustee, Northern Trust Company when it says "but this fact must be read in the light of all the instruments likewise stipulated, including the instrument of revocation of the 1923 trust." Among the instruments that must be so read is the trust indenture of January 12, 1923. Under this indenture the trustee was to have as wide a latitude as an absolute owner in the selection and making of investments or conveyance of the trust corpus [Tr. 17].

It is submitted the stipulation of fact that he made the transfer on May 27, 1931 is correct. He simply exercised

one of the powers given him in 1923 when, as his final act as trustee, he conveyed the trust corpus to Northern Trust Company, the alternate trustee, named in the original trust indenture. Then John Alexander Maclean became inactive in the trust. The fact that John Alexander Maclean decided, for reasons sufficient to himself, to exercise the power granted him by the 1923 trust, also coinciding with the desire and instruction of his wife, does not alter the fact that he reinvested the corpus of his trust by conveying it to Northern Trust Company, trustee. He held the power of an absolute owner to transfer that corpus. He simply exercised this power while he was still acting as trustee. Then his wife revoked his trust. The transfer of May 27, 1931, even when read in the light of all the stipulated instruments, was still a transfer by John Alexander Maclean, trustee, and not by this decedent. It should be excluded from her gross estate. His wife merely approved his decision and action in a formal manner when she revoked the trust [Ex. B, Tr. 20].

There is no proof that the husband-trustee made the transfer of May 27, 1931 as a result of his wife's command. At best, the evidence only supports the conclusion that both spouses were, for some reason not shown by the record, agreed that the corpus of the trust should be managed thereafter by the Northern Trust Company, the alternate trustee.

II.

Second Division of the Government's Argument Takes the Position That the Death of Elizabeth Beatrice Maclean's Husband on February 19, 1941 Amounted to Her Making a Transfer in Trust on That Date of the Corpus Here Involved.

In support of this contention the case of *Reinecke v. Northern Trust Company* (1929), 278 U. S. 339 affirming and reversing the District Court of Illinois and C.C.A.—7 is cited (p. 18, Govt. Br). That case involved two sets of trusts. The District Court and the Circuit Court of Appeals had sustained the Commissioner's action in including the corpus of these trusts in the decedent's gross estate. Two of the trusts, No. 1831 and 3048 were created respectively in 1903 and 1910. In these trusts the grantor alone reserved the power of revocation upon the exercise of which the trustee was required to return the corpus of the trust to him. He still had the power of revocation at the date of his death. The corpus of these two trusts was held by the Supreme Court to be includable in the gross estate. Elizabeth Beatrice Maclean, the decedent with whose estate we are here concerned, did not reserve a sole power of revocation and no such power was held by anyone on the date of her death. In that, her trust is distinguishable from trusts No. 1831 and 3048 dealt with in the case of *Reinecke v. Northern Trust Company, supra*.

However, in the case before the Supreme Court here were five other trusts No. 4477, 4478, 4479, 4480 and 4481 which were created in 1919. In those the power was reserved "to alter, change or modify the trust" by the settlor jointly with one or more of the beneficiaries. The settlor died without having modified any of the five trusts

in a material manner. The Supreme Court excluded the corpus of these five trusts from the taxable gross estate. In the course of its opinion the Supreme Court said:

“* * * since the power to revoke or alter was dependent on the consent of the one entitled to the beneficial, and consequently adverse, interest, the trust, for all practical purposes, had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute.

* * *

“In the light of the general purpose of the statute and the language of section 401 explicitly imposing the tax on net estates of decedents, we think it at least doubtful whether the trusts or interests in a trust intended to be reached by the phrase in section 402(c) ‘to take effect in possession or enjoyment at or after his death,’ include any other than those passing from the possession, enjoyment or control of the donor at his death and so taxable as transfers at death under section 401. That doubt must be resolved in favor of the taxpayer, *Gould v. Gould*, 245 U. S. 151, 153, 38 S. Ct. 53, 62 L. Ed. 211; *United States v. Merriam*, 263 U. S. 179, 187, 44 S. Ct. 69, 68 L. Ed. 240, 29 A. L. R. 1547.”

In the Maclean trust as in the case before the Supreme Court, the decedent required the consent of a beneficiary holding an adverse interest before she could revoke her trust. The Supreme Court’s decision in the case of *Reinecke v. Northern Trust Company*, *supra*, supports the taxpayer’s present contention. It does not support the Government’s contention (Br. p. 20) that:

“because of decedent’s retention of the power of revocation, the trust corpus would have been included

in her gross estate both before and after *May v. Heiner*. The 1949 Amendment, excluding transfer made prior to March 4, 1931, obviously then did not intend to cover decedent's situation. She could not properly have relied upon the *May v. Heiner* case in view of the earlier case of *Reinecke v. Northern Trust Company*, *supra*. * * *

It is submitted the case of *Reinecke v. Northern Trust Company*, *supra*, confirms Elizabeth Beatrice Maclean's action in placing reliance upon *May v. Heiner* since she could not revoke the trust without the consent of her husband, one of the beneficiaries.

The Government's Brief pointed out another of the weaknesses of its own case when it was stated (Br. p. 18):

"Therefore, a trust such as that at bar, wherein decedent had a right to revoke the trust would have been includable in gross estate both before and after the decision in *May v. Heiner*, if at the time of death was still revocable." (Emphasis supplied.)

Elizabeth Beatrice Maclean's trust was not revocable at the time of her death. Its corpus should therefore be excluded from her gross estate.

The case of *Chase National Bank v. United States* (Govt. Br. p. 21) involves an estate tax imposed on the proceeds of a life insurance policy under which the decedent retained the sole power of changing the beneficiary. The Supreme Court sustained the tax because the decedent retained this power at the time of his death. In the course of its opinion the Supreme Court said:

"* * * That, it is true, was said of a succession tax, and we are here concerned with a transfer tax.

The distinction was there important for it was at least doubtful whether upon the death of the settlor there was any such termination, as to him, of a power of control over the remainder such as would have been subject to a tax levied exclusively on transfers, since the power was not vested in him alone, but in him and another. See *Reinecke v. Northern Trust Co.*, 278 U. S. 339, 49 S. Ct. 123, 73 L. Ed. decided this day. But we think that the rule applied in *Saltonstall v. Saltonstall*, supra, to a succession tax is equally applicable to a transfer tax where, as here, the power of disposition is reserved exclusively to the transferror for his own benefit. Such an outstanding power residing exclusively in a donor to recall a gift after it is made is a limitation on the gift which makes it incomplete as to the donor as well as the donee, and *we think that this termination of such a power at death may also be the appropriate subject of a tax upon transfers.*"

It is submitted that Mrs. Maclean never had an exclusive power to revoke her trust and she had no power at all to revoke it when she died. The *Chase National Bank* case supports the taxpayer's contention in the case presently before the Court.

On page 21 of the Government's Brief the case of the *Estate of Sanford v. Commissioner* (1939), 308 U. S. 39 is cited. There the decedent had created a trust of personal property in 1913 reserving to himself the power to terminate the trust in whole or in part or to modify it. He surrendered the power to revoke the trust in 1919 but reserved the power to modify it. After the Gift Tax Act became effective in August, 1924 the decedent renounced

his powers to modify the trust. The Commissioner ruled that the gift to the trust became complete and was taxable only after the power to modify was renounced. The taxpayer contended the transfer took place when the right to revoke was surrendered prior to the effective date of the Gift Tax Act. The Supreme Court rejected the contention that a transfer took place in 1919 when the right to revoke the trust was surrendered. It is submitted that when Elizabeth Beatrice Maclean's hope or possibility of revoking her trust with the consent of her husband perished with his death on February 19, 1941, no transfer took place. No right to modify the trust remained in the hands of Elizabeth Beatrice Maclean after 1941.

It is submitted that the case of the *Estate of Sanford v. Commissioner, supra*, sustains the proposition that the termination of the power to revoke a trust prior to a grantor's death does not amount to a transfer within the meaning and intent of §811(c)(1)(B) of the Internal Revenue Code of 1939. To the same effect as the case of *Sanford v. Commissioner, supra*, is the case of *Rasquin v. Humphreys*, 308 U. S. 54 decided the same day.

In the case of *Burnet v. Guggenheim* (1933), 288 U. S. 280 (cited at Govt. Br. p. 22). Deeds of Trust were made in 1917 and the grantor reserved the power of revocation in himself. This power to alter, modify or revoke was surrendered in 1925. The Supreme Court sustained a gift tax imposed at the time of the surrender on the ground that the transfer occurred when the power to alter, modify or revoke was surrendered. In the *Guggenheim* case, as compared with the case of the *Estate of Sanford, supra*, it is necessary to conclude the Supreme Court sustained the gift tax because of the grantor's act in surrendering his power to modify the trust. At the time the gift was

complete and the tax accrued. It should also be noted that in the *Guggenheim* case the power of revocation reposed in the grantor alone. This distinguished it from the present case. See *Reinecke v. Northern Trust Company*, *supra*. §811(c)(1)(B) of the Internal Revenue Code of 1939 involved in the present case was, of course, not under consideration in the *Guggenheim* case.

It is submitted that since we are here concerned with a statute imposing a tax whose meaning is doubtful, the doubt should be resolved in favor of the taxpayer and against the Government. *Gould v. Gould*, 245 U. S. 151, 38 S. Ct. 53, 3 A. F. T. R. 2958 (1917) affirming S. Ct. N. Y. (168 App. Div. 900, 152 N. Y. Supp. 1144).

Conclusion.

For the reasons announced in the appellant's opening brief and those contained herein, it is respectfully submitted that the District Court's Judgment of March 3, 1959 should be reversed with instructions that Judgment be entered for the Appellants.

ERNEST R. MORTENSON,

Attorney for Appellants.

No. 16473 ✓

United States
Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

NATIONAL AUTOMOTIVE FIBRES, INC.,
AND TEXTILE UNION LOCAL No. 146,
TEXTILE WORKERS UNION OF AMER-
ICA, AFL-CIO, Respondents.

Transcript of Record

Petition For Enforcement of Order of The
National Labor Relations Board

FILED

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PAUL P. O'BRIEN, CLERK



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Transcript of Proceedings—(Continued):

Exhibits For General Counsel—(Continued):

14—By-Laws of Textile Workers Union of America (Excerpt)	78
16—Agreement Dated May 1, 1956 Between Oakland Division, National Automotive Fibres, Inc. and Textile Workers Union of America (Excerpt).....	80

Witnesses for the General Counsel:

Brown, Lloyd E.	
—direct (Karasick)	73
Harnack, Harold	
—direct (Karasick)	74
Molton, Curtis	
—direct (Karasick)	40

Witness For Respondent Union:

Baltrun, Sonia	
—direct (Galliano)	56
—cross (Warner)	62
—cross (Karasick)	63
—recalled, redirect (Galliano).....	72

NAMES AND ADDRESSES OF ATTORNEYS

THOMAS J. McDERMOTT,
Associate General Counsel,
MARCEL MALLET-PREVOST,
Assistant General Counsel,
National Labor Relations Board,
Washington 25, D. C.,
Attorneys for Petitioner.

N. A. WARNER,
Ocean View and Eardley Avenues,
Pacific Grove, California,
Attorney for Respondent Employer.

JAMES F. GALLIANO,
1419 Broadway,
Oakland 12, California,
Attorney for Respondent Union.



United States of America
Before the National Labor Relations Board
Division of Trial Examiners
Branch Office
San Francisco, California

Case No. 20-CA-1371

NATIONAL AUTOMOTIVE FIBRES, INC.,
Respondent,
and

CURTIS MOLTON, an Individual,
Charging Party.

Case No. 20-CB-538

TEXTILE UNION LOCAL No. 146, TEXTILE
WORKERS UNION OF AMERICA, AFL-
CIO,
Respondent,
and

CURTIS MOLTON, an Individual,
Charging Party.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Statement of the Case

The consolidated complaint herein alleges in effect violation of Section 8 (b) (1) (A) and (2) by the Respondent Union, and violation of Section 8 (a) (1) and (3) by the Respondent Employer, in

that the former required the discharge of Curtis Molton, the charging party herein, because of his refusal to pay the Union a fine, and that the latter discharged Molton, on the Union's request, with knowledge that the request was based on Molton's refusal to pay the Union a fine.

In their respective answers, the Respondents admitted the jurisdictional allegations but denied the alleged commission of unfair labor practices.

At the hearing on the complaint, conducted before the undersigned Trial Examiner at San Francisco, California, on February 11, 12, 1958, all parties were represented, participated, and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence on the issues. Upon the conclusion of the evidence, the General Counsel's representative at the hearing argued his position on the record, and thereafter, the Respondent Union availed itself of the privilege accorded all parties to file a brief.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

Findings of Fact

I. The business of the Employer

National Automotive Fibres, Inc., the Respondent Employer herein, is a Delaware corporation with its principal office and place of business in Detroit, Michigan, engaged in the business of manufacturing cushion padding and exterior trim for automotive use. The Respondent Employer owns and op-

erates plants in New York, New Jersey, Ohio, and in Los Angeles and Oakland, California. Only the Oakland plant is involved in these proceedings. Total purchases shipped to the Oakland plant from outside the State of California, exceed \$500,000 annually. On these facts jurisdiction is admitted and found.

II. The labor organization involved

Textile Union Local No. 146, Textile Workers Union of America, AFL-CIO, the Respondent Union herein, is a labor organization within the meaning of Section 2 (5) of the Act.

III. The unfair labor practices

Since May 1, 1956, the Union and the Employer have had an admittedly valid union shop contract providing, inter alia, for payroll deduction of union dues. In July, 1956, Employee Curtis Molton was laid off but not discharged by the Employer. On being notified of the layoff, Molton applied to Employee Edward Billie, the Union's steward in the plant, for a withdrawal card. Billie informed Molton that he was not eligible for a withdrawal card because he owed a fine for not attending union meetings. The fine was one or not more than two dollars. Molton did not pay the fine and did not get a withdrawal card. A person holding a withdrawal card was not required to pay union dues during the period of his layoff. The Union's by-laws provide for the issuance of withdrawal cards to members in good standing upon leaving the in-

dustry, and since Molton was not leaving the industry the Union was not required under its bylaws to issue him a withdrawal card even were he in good standing at the time the request was made. However, admittedly it was the uniform practice of the Union's Local with which Molton was affiliated to issue withdrawal cards, on request, to such of its members as were in good standing whenever they were laid off. Clearly also, the practice was to issue withdrawal cards only to members in good standing and by virtue of his refusal to pay a one or two dollar fine, Molton was not a member in good standing.

On January 9, 1957, Molton was recalled to work. Starting with February, his union dues were deducted by the Employer. His January dues, not subject to payroll deduction because of bookkeeping routine, he paid directly to the Union, together with a fine and an assessment, in May, 1957. About February, 1957, Gus Billie, then a shop chairman, and in March or April, Ben Statum, secretary of the Union's Local, informed Molton that he would have to pay up his union dues for the period of his lay-off. Molton protested that he did not think this was a just requirement inasmuch as he had applied for a withdrawal card on the day he was laid off. Later, Sonia Baltrun, business manager of the Local, came to the plant where Molton worked and in the presence of Johnny Cambria, Molton's foreman, and others, informed Molton that he would either have to pay union dues for the some five

months of his layoff, or an initiation fee of \$10 for reinstatement in the Union. According to Molton, he again protested that he did not think this was fair inasmuch as he had applied for a withdrawal, and since his recollection appeared to be the clearest on the point his testimony is credited. It was his further credited testimony that he protested the action "threatened" by Baltrun to Ben Thomas, president of the Local in the plant, and that Thomas said he would hold the matter in abeyance until Molton appeared before the Local's executive board.

In the latter part of May or June, Molton appeared before the Local's executive board and was informed by it that he would have to pay his dues for the period of the layoff or pay an initiation fee. Molton then agreed that he would pay his back dues. He did not, however, thereafter at any time make an actual tender of the dues in question.

According to him, about June 25 Baltrun reminded him of his promise to pay his back dues, and he replied that if she had a blank check he would sign it but that she replied she would not furnish him with one if she had one because she doubted that he had the money in the bank. Baltrun denied that such an offer was made, but assuming without finding that it was, it would not in my opinion, amount to an actual tender of the dues, whether or not Molton had money in the bank to cover the amount of the check. Obviously, if he had had any actual intention of paying his dues at that time, and had the money, he could have arranged

to have had a check cashed. According to Molton, after being refused a blank check by Baltrun, he promised that he would tender his dues the following Friday, June 28. It happened, however, that he was laid off that Friday, returning to work the following Monday. On that day, according to him, he attempted to see Jimmie Clark, a union steward, but Clark was not at work and presently Molton went home because he became ill after an hour or two at work. Admittedly, there were other union stewards in the plant to whom he might have tendered his dues, though he "more or less always dealt with Jimmie Clark unless he wasn't there." Molton did not return to work until July 9, during which time there was a death in his family and during which time he made no effort to tender his union dues, and when he returned on July 9 he found that his card had been pulled. His foreman informed him that the Union had caused his card to be pulled because of his failure to pay his back dues. Thereupon, he left the plant.

As a matter of fact, by letter dated July 1, Baltrun had notified the Employer that Molton was not a union member in good standing because he was delinquent in his dues payments, and had requested Molton's discharge pursuant to the terms of the union shop agreement. The Employer complied with the Union's request.

It is established to my satisfaction that the Respondent Employer was aware of the circumstance under which Molton came to be delinquent in his

dues payments. I have found that Molton protested the Union's refusal to issue him a withdrawal card in his foreman's presence, and his foreman at the time of his discharge, Harold Harnack, admittedly had been advised of Molton's failure to obtain a withdrawal card because he refused to pay a fine, and was also informed by the plant superintendent, Chartier, when the latter instructed him to make out a termination slip, of the circumstances leading to the Union's discharge request.

Subsequent to his discharge, Molton went to the Union's office and, according to his testimony, there informed Baltrun that he would pay the back dues required of him if in doing so he could get his job back, but was informed by Baltrun that even if he paid up he would not be sure of getting his job back and that the Union's executive Board had required his discharge because he was a "bad influence" in the Union. On cross-examination, in testifying on this conversation, he testified that Baltrun said she had decided that he was a bad influence in the Union. According to him, he did not inquire and she did not explain what she meant by that. Baltrun's version of the conversation was that Molton asked for his job back and when she inquired if he had the money for his delinquent dues he replied in the negative but said he would "straighten" that out. She informed him that she could not trust him and that ended the interview. I find that Baltrun did not tell Molton that the Union's executive board had required his discharge because he

was a "bad influence" in the Union. If the Union rightfully required his discharge, it was under no legal obligation thereafter to attempt to get his job back for him, whether or not following his discharge he made a dues tender. Assuming without finding that Baltrun told him he was a "bad influence" in the Union, this may very well have stemmed from the fact that he agreed to pay dues for the layoff period and then evaded doing so.

Summarization and Conclusions

The facts upon which a decision here rests are, I think, clearly defined.

On the day that he was laid off Molton requested and was refused a withdrawal card. It is true that he made only one request and that to a shop steward, and did not pursue the matter further. The fine in question being no more than two dollars, it may be assumed that Molton did not at that time attach a great deal of significance to his failure to obtain a withdrawal card, but there was no corroboration of Baltrun's hearsay testimony that she was informed by the shop steward that Molton did not want a withdrawal card because he did not intend to return to work with this Employer, and no weight can be attached to it. The denial of a withdrawal card by the shop steward was a denial by the Union, and Molton was not required to pursue the matter further, though had he been greatly interested at the time I think he would have ap-

pealed the matter to higher ranking union representatives.¹

The withdrawal card was denied Molton because he refused to pay a one or two dollar fine for not attending one or two union meetings, as the case may be.

The denial of the withdrawal card was not discriminatory with respect to Molton individually, for it was the uniform practice of the Union to issue withdrawal cards to laid off members only when the said members were in good standing at the time the withdrawal was requested, and, because of his refusal to pay the fine assessed against him, Molton was not a member in good standing.

The Union was not required by its bylaws to issue withdrawals to laid off members but only to members leaving the industry, and Molton did not apply on the basis of leaving the industry but in his status as a laid off employee. However, it was the uniform practice of this Local to issue such withdrawals to laid off members and had Molton been a member in good standing at the time he requested a withdrawal he would have received it.

Molton did not cease to be an employee during the period of his layoff, and he was not expelled from the Union. Baltrun testified that after four months of non-dues payments, he was "dropped"

¹ He was diligent enough in his efforts to evade the payment of dues for his layoff period, a requirement that he must have been aware of at the time the union steward told him he did not qualify for a withdrawal.

from the union rolls, but this appears to have been no more than a bookkeeping formula. The payroll deductions for his union dues continued after he was recalled to work and the Union accepted his January, 1957, dues not covered by payroll deductions.

Prior to the meeting of the Union's executive board in May or June, 1957, Molton refused to pay dues for the period of his layoff, but at that meeting agreed to pay the dues demanded of him.

Molton did not at any time make an actual tender of these dues. His various explanations of his failure to do so I found unconvincing. He impressed me as being an intelligent and somewhat crafty individual.

Unable to collect the back dues demanded of Molton, the Union on July 1, 1957, requested his discharge.

The reason given for the discharge request was that Molton was not a member in good standing because of dues' delinquency.

The Union did not therefore request Molton's discharge because of his refusal to pay a fine but because he refused to pay his union dues for the period of his layoff.

Not at any time following its refusal to issue a withdrawal card to Molton, did the Union request Molton to pay the fines outstanding at the time of the refusal.

The broad issue is whether the dues, in the payment of which Molton was clearly delinquent, were "periodic dues * * * uniformly required as a condi-

tion of acquiring or retaining membership.”² They were periodic dues uniformly required of all members who did not hold withdrawal cards during the period of a layoff. Molton did not hold a withdrawal card because he refused to pay fines imposed on him for failure to attend one or two union meetings. Therefore, while the immediate cause of his discharge was his dues’ delinquency, the said dues’ delinquency arose from the fact that he refused to pay a fine or fines. From this, the General Counsel argues that the refusal to pay a fine was the real or proximate cause of the discharge.

Had the Union requested his discharge because of his refusal to pay a fine for non-attendance of union meetings, the discharge patently would have been unlawful, for the Board has uniformly held that fines of this character are not “periodic dues” within the meaning of the Act. But the Union did not seek his discharge on his refusal to pay the fines. It did refuse him a withdrawal card because he was not a member in good standing, and it was its uniform practice to issue withdrawal cards only to members in good standing. Obviously, there is

² The issue arising from Molton’s discharge, as framed by the pleadings and the contentions of the parties, is based upon those provisions of Section 8 (a) (3) and 8 (b) (2) which ban discrimination against an employee subject to a union-shop contract if his “membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.”

nothing in the Act which would require the Union to waive the payment of dues during a layoff period, while the employee remained an employee subject to the terms of the union shop contract, by the issuance of withdrawal cards or otherwise. The question is strictly one of its right to withhold the waiver from one classification of members (those not in good standing) while granting it to another (members in good standing).

The Board has held that "periodic dues and initiation fees uniformly required" does not mean that in all cases the initiation fees and dues must be the same for all classifications of employees. In *Food Machinery and Chemical Corporation*, 99 NLRB 1430, it held that an initiation fee for former union members twice that required of new members was not discriminatory because it was based on a reasonable classification. In this decision it said:

Congress did not intend the Board to find labor organizations in violation of the law, where, as here, following well-settled practice, they have done no more than to establish a different but fairly reasonable, classification of former members as distinguished from new applicants. In our opinion a contrary interpretation is unnecessarily harsh and is required by neither the spirit nor the literal language of that section. [Section 8 (b) (5).] * * * the Respondent Union did not per se violate the Act by according former members special consideration in setting their reinstatement fee, whether that fee was greater or less than the initiation fee

required of new or other reasonable classifications of applicants. The burden was on the General Counsel to prove not only that the fee charged Bauer was disparate, but that it was discriminatory in its application.³

The Board in this decision makes the further comment that had Bauer, the employee involved, as a former member of an affiliated lodge, held an honorary withdrawal or retiring card from that Local, he would have been charged only a nominal initiation fee, and, it must be inferred, had this been the case the Board would have regarded it as permissible. In other words, classifications for purposes of disparate though non-discriminatory fees, of former members holding withdrawal cards, former members not holding withdrawal cards, and new members, would, under this decision, satisfy the Act's requirement of initiation fees "uniformly" required. I find nothing in this decision from which it reasonably could be inferred that the union's uniformly applied rules governing the issuance or non-issuance of "honorary withdrawal or retiring" cards would be considered material to a determina-

³ While this rationale applied specifically to an alleged 8 (b) (5) violation, it was also the basis for the Board's dismissal of the 8 (b) (1) and (2) allegations of the same complaint. Obviously, if reasonable classifications may form the basis for a differential in initiation fees, the same would be true with respect to periodic dues, and this is implied in an earlier decision in *The Electric Auto-Lite Company* case, 99 NLRB 1073, cited by the Board in its *Food Machinery* decision.

tion of the reasonableness of the classification under which former members holding such cards would be charged a lesser initiation fee than former members not holding such cards. As has been noted, here the Union's refusal to issue Molton a withdrawal card for his layoff period, was according to the Union's uniform practice. The parallel is obvious.

In a more recent case, *Kuner-Empson Company*, 106 NLRB 670, 673, 674, the Board found no violation under a union shop contract where the Union expelled one of its members for dual unionism and, 14 months later, caused her discharge when she refused to pay an initiation fee as a new member. In this decision the Board said:

In determining the rights and obligations of expelled members under circumstances such as these, we take the view that expelled members are not in a privileged class perpetually immune from union-security provisions and from any obligation of tendering dues and that they cannot remain in that privileged category despite successive contracts which would otherwise impose new conditions of employment upon them in that regard. We therefore find that expelled members are subject to valid-union-security provisions in existing contracts to which the union from which they were expelled is a party. To hold otherwise would be to contravene the clearly expressed intent of Congress to protect labor organizations by permissive provisos

against "free riders" and to permit them to maintain discipline in the ranks.

Clearly, had the union caused this employee's discharge because it had expelled her for dual unionism, there would have been a violation, and, in the instant case, had the Union caused Molton's discharge because he refused to pay a fine, there would have been a violation. This much is above argument. In the Kuner-Empson case, the union having converted an employee subject to union shop requirements into a "free rider," obviously was not required to continue her as a free rider indefinitely; it could put a stop to the free ride at any time while the union shop contract existed by admitting her once more as a member; but it did more than merely end her status as a free rider: it required her to pay a new initiation fee, and this would not have been required of her had she not been expelled from the union for dual unionism.

Again, the parallel is obvious. Here the Union refused to convert Molton into a free rider for the period of his layoff by the issuance to him of a withdrawal card, for the reason that he refused to pay a fine. Some 5 months later, when he had been recalled to work, the Union required him to pay dues for his layoff period, or an initiation fee, and when he refused, caused his discharge. It may be argued with considerable cogency that if the refusal to pay a fine was the cause or proximate cause of Molton's discharge, the employee's expulsion for dual unionism in the Kuner-Empson case,

was the cause or proximate cause of the discharge in that case. There are, however, certain distinguishing factors.

Here there was no hiatus in Molton's employment. He continued to be an employee throughout the period of his layoff. In the Food Machinery case, the Board was dealing with newly hired employees, and whether they held or did not hold withdrawal cards referred to prior employment. Had there been a break in Molton's employment instead of a layoff, I think there could be no question under the Food Machinery case, that he could have been classified as a former member without a withdrawal and required to pay a new initiation fee greater than that required of former members with withdrawal cards.

In the Kuner-Empson case, a new union shop agreement was made between the time the employee in question was expelled from the Union and the time when her discharge was caused by her refusal to pay a new initiation fee. It appears that the Board attached weight to this factor as well as to the time elapsed between the expulsion from the Union and the discharge.

In short, in both of these cases there is an intervening factor not present here. In both the issue was initiation fees required under a new contract, whereas here the discharge was made under the same contract in effect at the time of Molton's lay-off. A new contract with a valid union shop provision, may be said to initiate new obligations with

respect to union membership. In the Food Machinery case the Board apparently did not find it material in determining the reasonableness of classifications with respect to initiation fees, to consider the circumstances under which a former union member in a prior place of employment and under a different contract, was granted or denied a withdrawal card. In the Kumer-Empson case, the Board apparently considered the circumstances under which an employee was expelled from membership under a prior contract immaterial in determining her obligations arising from the current existing contract under which she was discharged, although her employee status had been continuous under both contracts. I know of no case where the Board has approved classifications governing initiation fees and dues requirements based on a violation of union rules with respect to fines, assessments, and similar categories, where there is continuity of employment under one contract. The distinction may appear to be a thin one, but in the Electric Auto-Lite decision (citation footnote 3, *supra*), the Board plainly said that disparate dues requirements may not lawfully rest (as a basis for discharge) on classifications of employees who attend, and who do not attend union meetings. That there was just such a classification here for purposes of dues' requirements during layoff periods is clear, and Molton's discharge stemmed from that classification. I think that here we have no efficient intervening factor which reasonably may be said to bar Mol-

ton's refusal to pay a fine as the proximate cause of his discharge.

To approach the issue from a different angle, there was not in this case a separation of the demand for dues from the demand for a fine or fines, such as existed in the National Lead decision (National Lead Company, 106 NLRB 545, 547) where the Board overruled its Trial Examiner and found no violation. In the National Lead case, the Union first refused to accept a member's dues unless the member also paid certain outstanding fines, but later, without reference to fines, required the member to pay all delinquent dues. Here, no such separation is possible because the Union's refusal of a withdrawal card was based on Molton's refusal to pay a fine, and had the withdrawal card been issued to him there would have been no dues' delinquency. True, when the Union demanded dues for his layoff period it did not also demand the payment of fines and no mention was made of fines, and this was a separation of sorts, but here the causative factor for the dues' delinquency was the refusal to pay a fine and there was no such causative factor in the National Lead case.

Being of the opinion that the weight of Board authority, as best I can weigh it, supports the General Counsel's position, I find that by causing Molton's discharge the Union violated Section 8 (b) (1) (A) and (2) of the Act, and that by discharging Molton with knowledge of the circumstances grounding the Union's discharge request, the Employer violated Section 8 (a) (1) and (3) of the Act.

IV. The effect of the unfair labor practices upon commerce

The activities of the Respondents set forth in Section III, above, occurring in connection with the operations of the Employer set forth in Section I, above, have a close, intimate, and substantial relation to trade, traffic and commerce among the several States, and tend to lead to labor disputes burdening commerce and the free flow of commerce.

V. The remedy

It having been found that the Employer discharged Curtis Molton in violation of Section 8 (a) (3) of the Act, and that the Union caused the Employer so to discharge Molton, thereby violating Section 8 (b) (2) of the Act, and Molton thereafter having been reinstated, it will be recommended that the Employer and the Union jointly and severally make Molton whole for any loss of pay he may have suffered by reason of the discrimination against him, by payment to him of a sum of money equal to that he would have earned in the Respondent Employer's employ from the date of his discharge to the date of his reinstatement, less his net earnings during said period, the back pay to be computed on a quarterly basis in the manner established in *F. W. Woolworth Company*, 90 NLRB 289. As provided in *Woolworth*, it will be recommended that the Employer on request make available to the Board payroll and other records, in order to facilitate the computation of the back pay.

On the basis of the foregoing findings of fact, and upon the entire record in the case, the undersigned makes the following:

Conclusions of Law

1. The Respondent Union is a labor organization within the meaning of Section 2 (5) of the Act.

2. By discriminating in regard to the hire and tenure of employment of Curtis Molton, the Employer has engaged in unfair labor practices within the meaning of Section 8 (a) (3) of the Act, and thereby has interfered with, restrained and coerced its employees in the exercise of rights guaranteed by Section 7 of the Act, in violation of Section 8 (a) (1) of the Act.

3. By causing the Employer to discriminate in regard to the hire and tenure of employment of Curtis Molton in violation of Section 8 (a) (3) of the Act, the Respondent Union has engaged in unfair labor practices within the meaning of Section 8 (b) (2) of the Act, thereby restraining and coercing employees in the exercise of rights guaranteed by Section 7 of the Act, in violation of Section 8 (b) (1) (A) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and 2 (7) of the Act.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this proceeding, it is recommended that:

1. National Automotive Fibres, Inc., its agents, successors, and assigns, shall:

(1) Cease and desist from:

(a) Encouraging or discouraging membership of its employees in the Respondent Union or any other labor organization, by discriminatorily discharging any employee or in any other manner discriminating against any employee in regard to his hire, tenure, or any other term or condition of employment, except as authorized by Section 8 (a) (3) of the Act;

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

(2) Take the following affirmative action designed to effectuate the policies of the Act:

(a) Make Curtis Molton whole in the manner, according to the method, and under the conditions set forth in Section V, above, entitled "The Remedy";

(b) Post in conspicuous places, including places

where notices to employees are customarily posted, at its place of business in Oakland, California, copies of the notice attached hereto and marked Appendix A. Copies of said notice, to be furnished by the Regional Director for the Twentieth Region of the Board, shall, after being signed by an authorized representative of the Respondent Employer, be posted by it immediately upon receipt thereof and maintained by it for a period of 60 consecutive days thereafter. Reasonable steps shall be taken by it to insure that said notices are not altered, defaced, or covered by any other material;

(c) Notify the said Regional Director in writing, within 20 days from the date of the receipt of this Intermediate Report and Recommended Order, what steps it has taken to comply with the foregoing recommendations.

2. Textile Union Local No. 146, Textile Workers Union of America, AFL-CIO, its officers, representatives, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Causing, or attempting to cause, the Respondent Employer, or any other employer, except as authorized by Section 8 (a) (3) of the Act, to discharge employees or in any other manner discriminate against them in regard to their hire, tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization;

(b) Restraining or coercing employees of the Re-

spondent Employer, or any other employer, in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

(2) Take the following affirmative action designed to effectuate the policies of the Act:

(a) Jointly and severally with the Respondent Employer, make Curtis Molton whole in the manner, according to the method, and under the conditions set forth in Section V, above, entitled "The remedy";

(b) Post in conspicuous places, including places where notices to members are customarily posted, at its office and usual membership meeting place, copies of the notice attached hereto and marked Appendix B. Copies of said notice, to be furnished by the Regional Director for the Twentieth Region of the Board, shall, after being duly signed by a duly authorized representative of the said Respondent Union, be posted by it immediately upon receipt thereof and maintained by it for a period of 60 consecutive days thereafter. Reasonable steps shall be taken by it to insure that said notices are

not altered, defaced, or covered by any other material.

(c) Notify the said Regional Director in writing, within 20 days from the date of the receipt of this Intermediate Report and Recommended Order, what steps the said Respondent Union has taken to comply with the foregoing recommendations applicable to it.

It is further recommended that, unless on or before 20 days from the receipt of this Intermediate Report and Recommended Order, the Respondent Employer and the Respondent Union notify the said Regional Director in writing that they will comply with the foregoing recommendations respectively applicable to them, the National Labor Relations Board issue an order requiring each of the said Respondents to take the action respectively required of them above.

Dated this 24th day of April, 1958.

/s/ WILLIAM E. SPENCER,
Trial Examiner.

APPENDIX A

Notice to All Employees: Pursuant to the Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

Appendix A—(Continued)

We Will Not encourage or discourage membership of our employees in Textile Union Local No. 146, Textile Workers Union of America, AFL-CIO, or any other labor organization, by discriminatorily discharging employees or in any other manner discriminating against them in regard to their hire, tenure of employment, or any term or condition of employment, except as authorized by Section 8 (a) (3) of the National Labor Relations Act.

We Will Not in any other manner interfere with, restrain, or coerce employees in the exercise of the right to self-organization, to form or assist labor organizations, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the National Labor Relations Act.

We Will jointly and severally with Textile Union Local No. 146, Textile Workers Union of America, AFL-CIO, make Curtis Molton whole for any loss of pay he suffered as a result of discrimination against him.

All of our employees are free to become, remain, or refrain from becoming, members of any labor

Appendix A—(Continued)

organization, except to the extent that this right may be affected by an agreement in conformity with Section 8 (a) (3) of the National Labor Relations Act.

National Automotive Fibres, Inc.
(Employer)

Dated.....

By
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

APPENDIX B

Notice to Members of This Union and Employees of National Automotive Fibres, Inc.: Pursuant to the Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby give notice that:

We Will Not cause, or attempt to cause, National Automotive Fibres, Inc., or any other employer, except in accordance with Section 8 (a) (3) of the National Labor Relations Act, to discharge employees or in any other manner discriminate against them in regard to their hire, tenure of employment, or any term or condition of employment.

Appendix B—(Continued)

We Will Not in any other manner restrain or coerce employees of National Automotive Fibres, Inc., or of any other employer, in the exercise of the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the National Labor Relations Act.

We Will jointly and severally with National Automotive Fibres, Inc., make Curtis Molton whole for any loss of pay he suffered as a result of discrimination against him.

Textile Union Local No. 146, Textile Workers Union of America, AFL-CIO

(Labor Organization)

Dated.....

By

(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

United States of America
Before the National Labor Relations Board

Case No. 20-CA-1371

NATIONAL AUTOMOTIVE FIBRES, INC.,
Respondent,
and

CURTIS MOLTON, an Individual,
Charging Party.

Case No. 20-CB-538

TEXTILE UNION LOCAL No. 146, TEXTILE
WORKERS UNION OF AMERICA, AFL-
CIO, Respondent,
and

CURTIS MOLTON, an Individual,
Charging Party.

DECISION AND ORDER

On April 24, 1958, Trial Examiner William E. Spencer issued his Intermediate Report in the above-entitled proceeding finding that the Respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the

Respondent Union filed exceptions to the Intermediate Report and a supporting brief.¹

Pursuant to the provision of Section 3 (b) of the Act, the Board has delegated its powers in connection with these cases to a three-member panel.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in these cases, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following addition.

We agree with the Trial Examiner that the Employer and the Union violated, respectively, Section 8 (a) (1) and (3), and Section 8 (b) (1) (A), and 8 (b) (2) of the Act in effecting the discharge of Curtis Molton pursuant to their union-security agreement. The basic issue, as indicated in the Intermediate Report, is whether the back dues demanded by the Union for the 5 months of Molton's layoff were "periodic dues * * * uniformly required as a condition of * * * retaining membership."² As the Trial Examiner points out, the "causative factor" for Molton's dues' delinquency was his refusal to pay a fine for nonattendance at a Union meeting. The Board has held that the statutory

¹ The Union's request for oral argument is hereby denied as, in our opinion, the record, exceptions and brief adequately present the issues and positions of the parties.

² See footnote 2 of the Intermediate Report.

provisions involved herein include the requirement that dues be charged to all members alike or that any distinction be based upon reasonable general classifications.³ In our opinion, a classification of employees based upon failure to pay fines is not a "reasonable" classification within the meaning of the Electro Auto-Lite and Food Machinery decisions. Thus, when the obligation to pay back dues depends in effect on whether or not a member attends Union meetings, that type of charge is clearly not one that is uniformly applied. Accordingly, we find, as did the Trial Examiner, that by bringing about the discharge of Curtis Molton, the Employer and the Union engaged in conduct proscribed respectively by Section 8 (a) (1) and (3), and Section 8 (b) (1) (A) and 8 (b) (2) of the Act.

Order

Upon the entire record in these cases, and pursuant to Section 9 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby ordered the following:

1. National Automotive Fibres, Inc., its agents, successors, and assigns, shall:

(1) Cease and desist from:

(a) Encouraging or discouraging membership of its employees in the Respondent Union or any other labor organization, by discriminatorily discharging

³ The Electro Auto-Lite Company, 92 NLRB 1073, 1077. See also Food Machinery and Chemical Corporation, 99 NLRB 1430, 1431.

any employee or in any other manner discriminating against any employee in regard to his hire, tenure, or any other term or condition of employment, except as authorized by Section 8 (a) (3) of the Act;

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

(2) Take the following affirmative action designed to effectuate the policies of the Act:

(a) Make Curtis Molton whole in the manner, according to the method, and under the conditions set forth in Section V of the Intermediate Report, entitled "The remedy";

(b) Preserve and make available to the Board or its agents upon request, for examination and copying, all payroll records, social-security payment records, time cards, personnel records and reports, and all other records necessary to analyze the amounts of back pay due and the rights of employment under the terms of this Order.

(c) Post in conspicuous places, including places where notices to employees are customarily posted,

at its place of business in Oakland, California, copies of the notice attached to the Intermediate Report, and marked Appendix A.⁴ Copies of said notice, to be furnished by the Regional Director for the Twentieth Region of the Board shall after being signed by an authorized representative of the Respondent Employer, be posted by it immediately upon receipt thereof and maintained by it for a period of 60 consecutive days thereafter. Reasonable steps shall be taken by it to insure that said notices are not altered, defaced, or covered by any other material;

(d) Notify the said Regional Director in writing, within ten (10) days from the date of this Decision, what steps it has taken to comply herewith.

2. Textile Union Local No. 146, Textile Workers Union of America, AFL-CIO, its officers, representatives, agents, successors, and assigns, shall:

(1) Cease and desist from:

(a) Causing, or attempting to cause, the Respondent Employer, or any other employer, except as authorized by Section 8 (a) (3) of the Act, to discharge employees or in any other manner discriminate against them in regard to their hire, tenure

⁴ This notice shall be amended by substituting for the words "The Recommendations of the Trial Examiner," the words "A Decision and Order." In the event that this Order is enforced by the decree of a United States Court of Appeals there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

of employment or any term or condition of employment to encourage or discourage membership in any labor organization;

(b) Restraining or coercing employees of the Respondent Employer, or any other employer, in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

(2) Take the following affirmative action designed to effectuate the policies of the Act:

(a) Jointly and severally with the Respondent Employer, make Curtis Molton whole in the manner, according to the method, and under the conditions set forth in Section V of the Intermediate Report entitled "The remedy";

(b) Post in conspicuous places, including places where notices to members are customarily posted, at its office and usual membership meeting place, copies of the notice attached to the Intermediate Report and marked Appendix B. Copies of said notice, to be furnished by the Regional Director for the Twentieth Region of the Board, shall, after being duly signed by a duly authorized representative of the said Respondent Union, be posted by it immediately upon receipt thereof and maintained

by it for a period of 60 consecutive days thereafter. Reasonable steps shall be taken by it to insure that said notices are not altered, defaced, or covered by any other material;

(c) Notify the said Regional Director in writing, within ten (10) days from the date of this Decision and Order, what steps the said Respondent Union has taken to comply herewith.

Dated, Washington, D. C., October 14, 1958.

PHILIP RAY RODGERS, Member,
JOSEPH ALTON JENKINS,
Member,
JOHN H. FANNING, Member,
[Seal] National Labor Relations Board.

United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

NATIONAL AUTOMOTIVE FIBRES, INC., and
TEXTILE UNION LOCAL No. 146, TEX-
TILE WORKERS UNION OF AMERICA,
AFL-CIO, Respondents.

CERTIFICATE OF THE NATIONAL LABOR
RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.92,

Rules and Regulations of the National Labor Relations Board—Series 7, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a proceeding had before said Board and known upon its record as Case Nos. 20-CA-1371, and 20-CB-583. Such transcript includes the pleadings and testimony and evidence upon which the order of the Board in said proceeding was entered, and includes also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

1. Stenographic transcript of testimony taken before Trial Examiner William E. Spencer, February 11, 12, 1958, together with all exhibits introduced in evidence.

2. Copy of Trial Examiner William E. Spencer's Intermediate Report and Recommended Order dated April 24, 1958, (annexed to item 4 hereof).

3. Respondent Union's exceptions to the Intermediate Report received May 19, 1958, together with a request for oral argument before the Board. (Oral argument denied — see footnote 1, Decision and Order).

4. Copy of Decision and Order issued by the National Labor Relations Board on October 14, 1958, with Intermediate Report attached thereto.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor

Relations Board in the city of Washington, District of Columbia, this day of

[Seal] /s/ FRANK M. KLEILER,
Executive Secretary, National
Labor Relations Board.

Before the National Labor Relations Board
Twentieth Region

Case No. 20-CA-1371

In the Matter of:

NATIONAL AUTOMOTIVE FIBRES, INC.,
Respondent,
and

CURTIS MOLTON, an individual,
Charging Party.

Case No. 20-CB-538

In the Matter of:

TEXTILE UNION LOCAL No. 146, TEXTILE
WORKERS UNION OF AMERICA, AFL-
CIO, Respondent,
and

CURTIS MOLTON, an individual,
Charging Party.

TRANSCRIPT OF PROCEEDINGS

232 U. S. Appraisers Building, 630 Sansome
Street, San Francisco 11, California, Tuesday, Feb-
ruary 11, 1958.

Pursuant to notice, the above-entitled matter came on for hearing at 10:00 o'clock, a.m.

Before: William E. Spencer, Trial Examiner. [1]*

Appearances: David Karasick, Attorney, Twentieth Region, National Labor Relations Board, 856 U. S. Appraisers Building, 630 Sansome Street, San Francisco 11, California, appearing as counsel for the General Counsel. N. A. Warner, 2230 Livingston, Oakland, California, appearing on behalf of National Automotive Fibres, Inc., Respondent Employer. James F. Galliano, Attorney, 1419 Broadway, Oakland 12, California, appearing for Benjamin Wyle, Chief Counsel, Textile Workers Union of America, AFL-CIO, 99 University Place, New York 3, New York, on behalf of Textile Union Local No. 146, Textile Workers Union of America, AFL-CIO, Respondent Union. [2]

* * * * *

Mr. Karasick: As a result of an off-the-record discussion, it is my understanding that the parties stipulate and agree hereto as follows:

That the facts with respect to the business operations of the company are as stated in paragraph II of the complaint which is in evidence as General Counsel's Exhibit 5, and the Respondent Employer admits that it is engaged in commerce within the meaning of the Act.

Is that correct and do you so stipulate, Mr. Warner?

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

Mr. Warner: I so stipulate.

Mr. Karasick: Mr. Galliano?

Mr. Galliano: Yes, I agree with you.

Mr. Karasick: It is my understanding further, Mr. Examiner, that the parties hereto stipulate and agree that the Respondent Union, Textile Union Local No. 146, Textile Workers of America, AFL-CIO, is a labor organization within the meaning of the Act.

Is that a correct statement?

Mr. Galliano: We have so admitted in our answer, that is correct.

Mr. Karasick: Thank you, Mr. Galliano.

Mr. Warner?

Mr. Warner: So stipulated. [8]

* * * * *

CURTIS MOLTON

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows: [9]

Direct Examination

* * * * *

Q. (By Mr. Karasick): You are presently employed by the Respondent, National Automotive Fibres, Inc., are you not? A. Yes.

Q. When were you first hired by that employer?

A. 1948, September the 29th.

Q. And did you work steadily for that employer from that time until you were laid off in July 1956, with the exception of a couple of other times

(Testimony of Curtis Molton.)

when there have been layoffs because of lack of work? A. Yes.

Q. After each of those layoffs were you recalled by the company? A. Yes.

Q. In July 1956 you were laid off, were you not? A. Yes.

Q. And what was the reason for the layoff at that time? A. Lack of work.

Q. Do you remember the date of the layoff at that time, in July?

A. It was around the 18th of July. [10]

* * * * *

Q. At the time you were laid off, how long before did you hear about it?

A. That morning.

Q. The morning of the layoff? A. Yes.

Q. After you heard you were going to be laid off did you talk to anyone about it from the union?

A. Yes.

Q. Whom did you talk to?

A. Edward Billie.

Mr. Galliano: Pardon me. May I have that name?

Mr. Karasick: Edward Billie.

* * * * *

Q. As well as you can recall now, will you tell the Examiner [11] what you said and what Mr. Billie said on that occasion?

Mr. Galliano: May we have what other persons were present, if any, at the conversation?

Mr. Karasick: Surely.

(Testimony of Curtis Molton.)

Q. (By Mr. Karasick): Were other people present at the time this conversation occurred, Mr. Molton? A. Yes, there was.

Q. Do you remember the names of any of them?

A. Not specifically.

Q. Was there one or two or many or what?

A. Well, there was quite a few.

Q. Was this during the working time or a recess time?

A. This was during a recess period.

Q. And it was in the smoking room of the plant? A. Yes.

Q. And you can't remember any specific individual, is that right, by name, who was there?

A. Well, not at the—I couldn't remember all the people because quite a few comes in the smoking room at break time.

Trial Examiner: The question is: Do you remember any of them? Do you remember the names of any of them? If you don't just say you don't.

The Witness: No, I can't recall them.

Q. (By Mr. Karasick): Will you now tell the Examiner, please, what you said to Mr. Billie and what he said to you, as well as you can recall? [12]

A. I asked him for a withdrawal because I was being laid off, and I handed him my book.

Q. Did he reply?

A. Yes. He told me I couldn't have a withdrawal due to the fact that I owed a fine.

Q. That you owed a fine? A. Yes.

Q. Did he tell you what you owed the fine for?

(Testimony of Curtis Molton.)

A. Yes. It was for not attending the meetings.

Q. Do you remember how much the fine was?

A. It was one or two dollars.

Q. You are not sure whether it was one or two dollars, is that right? A. No.

Q. Did you get a withdrawal? A. No.

Q. Did you pay the fine? A. No.

Q. After you were laid off did the company recall you to work? A. Yes.

Q. When was that?

A. The 9th—about the 8th or 9th of January 1957.

Q. And you were returned to your old job finally as operator, is that right? A. Yes. [13]

Q. And at the same rate of pay, \$1.60½ an hour? A. Yes.

Q. Before you were laid off in July 1956 did the company deduct your dues, union dues, each month? A. Yes.

Q. After you got back in January 1957 did the company deduct your dues? A. Yes.

Q. Beginning with what month?

A. February.

Q. They didn't deduct them for January?

A. No.

Q. Did you pay your dues for January 1957 to the union? A. Yes.

Q. Whom did you pay them to?

A. James Clark.

Q. And who was James Clark?—Hold that just a minute.

(Testimony of Curtis Molton.)

Mr. Karasick: May I have a stipulation as to the official position of James Clark in the union? My understanding is he is a steward. Is he not?

Mr. Galliano: Is James Clark a steward?

Mr. Edward Billie: That is right.

Mr. Karasick: May it be so stipulated? [14]

Mr. Galliano: That is right, surely.

Mr. Karasick: Mr. Warner?

Mr. Warner: Yes. [15]

* * * * *

Mr. Karasick: Mr. Examiner, it is my understanding, as a result of an off-the-record discussion, the parties hereto agree that Edward Billie at all times material herein was a steward of the Respondent Union.

Is that a correct statement? Do you so stipulate, Mr. Galliano?

Mr. Galliano: Yes, that is correct.

Mr. Warner: As far as I know, that is correct.

Mr. Karasick: Thank you.

Q. (By Mr. Karasick): Mr. Molton, directing your attention to the month of February 1957, did you during that month have any discussion with any representative of the Union about money that the Union claimed you owed them? A. Yes.

Q. Whom did you have the discussion with?

A. With Gus Billie.

Q. And——

Mr. Galliano: Pardon me. I didn't get the name.

Q. (By Mr. Karasick): Is Gus Billie a brother of Edward Billie? A. Yes.

(Testimony of Curtis Molton.)

Q. What was Gus Billie's job with the Union at that time? A. I don't know.

Q. Was he a representative of the Union at all? Did he do work for the Union of some sort or other? [17] A. Yes.

Q. When were you working, days or nights?

A. Nights.

Q. At that time?

A. I was working swing shift.

Q. Now, do you remember the date in February that he talked to you?

A. No, I don't remember the exact date.

Q. Do you remember whether it was the first, the middle or the latter part of February?

A. It was along about the latter part of February.

Q. Latter part of February? A. Yes.

Q. Where were you at the time?

A. I was running inside the plant.

Q. Was anyone else present besides you and Gus Billie? A. No.

Q. As well as you can recall, will you state what Billie, Gus Billie, said to you and what you said to him?

A. Yes. He told me that I would have to pay—that Sonia had came in and told, gave him a note or something that I would have to pay my back dues for the time that I was off.

Q. Did you say anything to that?

A. Yes. I told him I didn't think it would be fair for me to have to pay back dues for the time

(Testimony of Curtis Molton.)

that I was off, due to [18] the fact that I had asked for a withdrawal the day that I was laid off.

Q. Did you tell him whether or not the withdrawal had been given you or why it had not been given you?

A. Yes; I told him that they refused to give it to me because of the fines.

Q. Is there anything else you can recall during the conversation at that time or is that in substance what was said?

A. That is approximately all that was said.

Q. Do you know Ben Statum? A. Yes.

Mr. Karasick: And his job, I understand the parties are willing to stipulate, is and has at all times material herein been secretary of Local 146?

Mr. Galliano: Who was that?

Mr. Karasick: It is my understanding that the parties are willing to stipulate that Ben Statum at all times material herein has been secretary of Local 146 of the Respondent Union. Is that correct?

Mr. Galliano: Is that correct?

Mr. Edward Billie: Yes.

Mr. Galliano: So I am informed. We will stipulate to that.

Mr. Karasick: Mr. Warner?

Mr. Warner: Yes. [19]

Mr. Galliano: May we have a moment here to ourselves?

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

(Testimony of Curtis Molton.)

Q. (By Mr. Karasick): After Gus Billie had spoken to you did Ben Statum talk to you about that matter? A. Yes.

Q. And how long after Gus Billie talked to you did Statum talk to you about it?

A. Well, it wasn't—it was, it must have been along about March, the last part of March or the first part of April.

Q. Last part of March or early April?

A. Somewhere in there.

Q. Is that your best recollection? A. Yes.

Q. And where were you at the time? Were you working in the plant?

A. I was in the plant, yes, at that time.

Q. Was anyone else present when you talked with him? A. No.

Q. Will you tell the Examiner and the parties what he said to you and what you said to him as well as you can now recall?

A. He told me that I would have to pay back dues for the period that I was laid off.

Mr. Galliano: Pardon me. May we have the witness speak up a little louder, please? [20]

Trial Examiner: Will you speak up a little louder, please?

A. He told me I would have to pay back dues for the time that I was off. And I said to him that I had asked for a withdrawal and was refused due to the fact that I was supposed to have owed a fine or something.

(Testimony of Curtis Molton.)

Q. (By Mr. Karasick): In other words, you told him what you had previously told Gus Billie?

A. Yes.

Q. Was there anything else of substance said in this conversation, that you remember?

A. Yes. I told him that I did not think it was fair for me to have to pay back dues for the time that I was off, as I had asked for a withdrawal.

Q. Do you know Sonia Baltrun? A. Yes.

Q. Do you know what her job is with the Union?

A. No more than—not exactly. I don't know the exact title.

Mr. Karasick: All right, may it be stipulated Sonia Baltrun is the business manager of Respondent Local 146?

Mr. Galliano: That is correct.

Mr. Warner: Yes.

Q. (By Mr. Karasick): Did Sonia Baltrun speak to you about this matter after your conversation with Statum? A. Yes. [21]

Q. Do you remember the month that occurred?

A. It was along about the last part of April or first or middle part of May.

Q. So it was either April or May? You are not sure? A. Yes.

Q. Where were you at the time?

A. In the plant.

Q. Was anyone else present besides you and Mrs. Baltrun on that occasion? A. Yes.

Q. Who? A. There was Johnnie Cambria.

Q. And who was Johnnie Cambria?

(Testimony of Curtis Molton.)

A. He was foreman of the department.

Q. Was that the department you worked in?

A. Yes.

Q. He was your foreman? A. Yes.

Q. Was there anyone else present at the conversation that you can recall?

A. Not right then. But later on Ben Statum came up.

Q. So Ben Statum wasn't there during all the conversation, is that right? A. No.

Q. But you and Sonia and Cambria were there during all that was said, is that right?

A. Yes.

Q. You were at your machine working?

A. Yes.

Q. Who came up first, Sonia Baltrun or Johnnie Cambria or both?

A. Johnnie Cambria called my attention, but they were both more or less simultaneous.

Q. You mean they came up and Johnnie Cambria called your attention to the fact that they were there, is that right? A. Yes.

Q. Now will you please state as well as you can recall what was said and who said it?

A. Sonia told me that I would have to pay the back dues for the time that I was off or either join the union, as a union member, new union member, and lose my seniority both in the union and as far as the plant was concerned.

Q. So she gave you a choice of joining the union

(Testimony of Curtis Molton.)

anew or paying the back dues—she mentioned what this other alternative was that you could follow?

A. Yes; rejoin the union, pay a new initiation fee.

Q. Then she said these other things you have said, right? A. Yes.

Q. Did you say anything about it?

A. Yes. I told her I didn't think it was fair for me to [23] have to pay back dues, due to the fact that I had asked for a withdrawal at the time that I was laid off and was refused.

Q. Did you tell her why you had been refused?

A. Yes; on account of the fine.

Q. Did you say that? A. Yes.

Q. Did she say anything to that?

A. Yes. She told me that more or less she was going to pull my card the next day, at the end of that shift, that the next morning my card would be pulled.

Q. Did she say that your card would be pulled, no matter what you did?

A. She said if I didn't pay, agree to pay her.

Q. Now, did Johnnie Cambria say anything during this conversation? A. Yes.

Q. What did he say?

A. He said if she authorized it he would have no choice except but to pull it.

Q. If she what?

A. If she told him to pull the card, he would have to pull it.

Q. Was anything else said, in substance, regard-

(Testimony of Curtis Molton.)

ing this matter, said at that conversation, that you can recall? Or is this about it? [24]

A. Not between us. Not between the three parties, no.

Q. Later did you talk about the matter to someone else? A. Yes.

Q. That same day? A. Yes.

Q. Who else did you speak to about it?

A. Ben Thomas.

Q. Ben Thomas? A. Yes.

Q. What position did Ben Thomas hold at that time?

A. He was the president of the local.

Q. The president of the local? A. Yes.

Q. Where did you speak to him?

A. In the opening room.

Q. In the plant, that is? A. Yes.

Q. And was anyone else present when you spoke to Thomas? A. Yes.

Q. Just the two of you?

A. Just the two of us.

Q. Will you please relate as well as you can recall now what you said to him and what he said to you?

A. Yes. I told him, too, that Sonia was intending to pull my card for the back dues, and I didn't think it was fair, due [25] to the fact that I had been laid off and I had asked for a withdrawal.

Q. Did he say anything? A. Yes.

Q. What did he say?

A. He told me more or less not to worry about

(Testimony of Curtis Molton.)

it because he would hold it until I went before the executive board.

Q. Now, after that conversation did you appear before the executive board of the local?

A. Yes.

Q. And when was that, do you recall?

A. This was about the third Monday in May, or June.

Trial Examiner: Third Monday in May or June?

The Witness: Yes, sir.

Trial Examiner: Which?

The Witness: I don't know.

Q. (By Mr. Karasick): You are not sure which month, is that right? A. No.

Q. Why do you set the time as being the third Monday?

A. Well, that is when they was holding union meetings at that particular time.

Q. Was the meeting that you appeared before the executive board on the same day that a union meeting was held? A. Yes. [26]

Q. And, as far as you can recall, it was a regular union meeting, is that it? A. Yes.

Q. And that is how you established the third Monday, is that it? A. Yes.

Q. Without going into all the details of the executive board meeting, what was the general discussion as far as you were concerned at that meeting? What did they tell you about yourself at that meeting, in substance?

A. Well, they more or less—we discussed that——

(Testimony of Curtis Molton.)

Mr. Galliano: Will you speak up, please, a little bit?

A. (Continuing) It was decided that I would either have to pay the back dues——

Q. (By Mr. Karasick): Now, the back dues were for what?

A. For the 1956, the five months in which I was off.

Q. The layoff period? A. Yes.

Q. All right. Go on.

A. Or either join the union all over again as a new member.

Q. In which event you would have to do what; did they say?

A. I would come in as a new member and be the first one laid off.

Q. Would you have to pay anything?

A. Yes. I would have to pay the new initiation fee. [27]

* * * * *

Q. When did you next report to work at the plant after July 1st, 1957?

A. On the 9th of July.

Q. 1957? A. Yes. [31]

Q. Did you go to work that day? A. No.

Q. Why not? A. My card had been pulled.

Q. You mean you came to the time clock and it was out of the rack, your card was out of the rack? A. Yes.

Q. What did you do then?

A. I went to the foreman.

(Testimony of Curtis Molton.)

Q. And who was the foreman?

A. Hal Harnack.

Q. That is H-a-r-n-a-c-k?

A. I guess so. I don't know.

Q. Was he our foreman at the time?

A. Yes.

Q. And where did you see him?

A. In the plant.

Q. Anyone else present besides you and he?

A. No.

Q. What was said by each of you, as well as you can now recall?

A. I asked him what happened to my card. He told me that the union had it pulled, due to the back, due to the back dues. [32]

* * * * *

Mr. Karasick: I have asked the reporter to mark as General Counsel's Exhibit 14 for identification the by-laws of Textile Workers Union of America, Local 146, which were in effect at all times material herein, and I offer this document, consisting of a printed booklet of 20 pages, in evidence as General Counsel's Exhibit 14.

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 14 for identification.) [56]

* * * * *

Mr. Karasick: General Counsel's Exhibit 15 has been marked by the reporter at my request and consists of a form withdrawal card which is issued

by the Respondent Union in situations which are applicable, and I offer that document in evidence as General Counsel's Exhibit 15.

Trial Examiner: Received without objection.

(The document heretofore marked General Counsel's Exhibit 14 for identification was received in evidence.)

(The document above referred to was thereupon marked General Counsel's Exhibit No. 15 for identification and was received in evidence.)

Mr. Karasick: I have asked the reporter, in addition, Mr. Examiner, to mark as General Counsel's Exhibit No. 16 for identification a mimeographed copy of a contract between the Company and the Respondent Union, consisting of some 21 mimeographed pages, together with appendices marked A and B, which, it is agreed between the parties, constitutes the contract which was in force and effect at all times material herein.

Mr. Warner: That is correct.

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 16 for identification.)

Mr. Karasick: I offer the document as General Counsel's [57] Exhibit 16.

Trial Examiner: Received, without objection.

(The document heretofore marked General Counsel's Exhibit No. 16 for identification was received in evidence.) [58]

* * * * *

SONIA BALTRUN

a witness called by and on behalf of the Respondent Union, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Galliano): Will you state your full name for the purposes of the record?

A. My name is Sonia Baltrun. I am the business manager of the Bay Area Joint Board, and that includes the local, Local 146.

Q. Sonia, you know Mr. Molton, don't you?

A. Well, I don't know him very well. I know——

Q. You know who he is?

A. By sight, yes.

Q. Did you have any conversations with him with respect to his employment with the National Automotive Fibres?

A. You mean with the company regarding him?

Q. Did you have any conversations with Molton?

A. Yes.

Q. In regard to his employment? [66]

A. That is right. I did.

Q. At the company? A. Yes.

Q. Do you recall when, about, the first conversation was that you had with him?

A. It's pretty hard for me to establish the dates because I, as a rule, do not handle any union details in the shops.

Q. What is your best recollection of approximately the time?

(Testimony of Sonia Baltrun.)

A. It was sometime, it could be sometime in April that I first approached——

Q. April of which year? A. '57.

Q. Of '57? A. Right.

Q. And where was that conversation?

A. That conversation took place in the factory in Mr. Cambria's office. That's the factory office there. Because I had to ask the company to ask him to come in to talk to.

Q. Just before you get to that, who was present, in addition to yourself and Mr. Molton, at that conversation?

A. I believe we had—Mr. Waters was there, who was the business agent.

Q. What is his first name?

A. James Waters.

Q. And he is a business agent of the local union? [67] A. That is right.

Q. He is also an employee of the company?

A. No.

Q. All right.

A. And I cannot recall whether it was Ben Statum or Edward Billie. He would probably remember who was present at that meeting.

Trial Examiner: And whose office was this?

The Witness: It was a company office. I made a request to talk to him. I made a request to the company to call him and talk to him.

Q. (By Mr. Galliano): By "him," you mean to talk to Molton? A. Yes, to Molton.

(Testimony of Sonia Baltrun.)

Q. And Mr. Cambria, do you know what his position was with the company?

A. Foreman.

Q. He is a foreman. Now——

Trial Examiner: Was he present during this talk?

The Witness: He came in later; he was.

Q. (By Mr. Galliano): Then, when the conversation started out, Mr. Cambria then was not present? A. No.

Q. But the other persons whom you have mentioned were present? A. That is right. [67-A]

Q. What was the conversation? Tell us in substance and effect what was said by who to your best recollection.

A. I had asked Mr. Molton if he was ready to pay the union what he owes—because I had sent a lot of slips through the stewards asking for——

Trial Examiner: Just confine yourself to what you said, please. Just what you said.

Q. (By Mr. Galliano): Just what was said.

A. That is what I said. I said I sent slips through the stewards and they were not able to collect the money. And I wanted to know if he was going to pay his obligations to the union. And he said at the time that he might pay, he is not—he will try to pay before the meeting.

Q. And your next—— A. If he can.

Q. And your next meeting that you had scheduled would be when?

A. Well, it was in April. I believe we talked

(Testimony of Sonia Baltrun.)

before the meeting of April—I may be wrong on that because I didn't remember the dates. However, he did not pay and then we asked him to appear before the executive board.

Q. Just staying, then, for the moment with the conversation that was held at the company's offices, which you started to tell us about, what else was said at that conversation?

A. Well, outside of that, we asked for the money; I don't remember of anything else that was said. [68]

Q. When you say you asked for the money, what money were you referring to?

Mr. Karasick: I object.

Trial Examiner: I think——

Mr. Karasick: I object to the form of the question.

Trial Examiner: I think she ought to stick to what she said. If she said what form, all right.

Q. (By Mr. Galliano): Was there any discussion in this conversation as to what the money was for? A. Yes.

Q. What was said in respect to that?

A. That he came back, he was dropped from the union rolls, he came back and, therefore, he owed a new initiation or, if he wanted to reinstate himself as a member of the union, he could pay the back money; however, it would be cheaper for him to pay a new initiation, it was put to him in that manner.

Q. Your initiation fee was how much?

(Testimony of Sonia Baltrun.)

A. Ten dollars.:

Q. Do you recall how much back dues were owing?

A. He owed approximately, for the time that he was laid off and didn't offer to pay any money during that period, it was five months. [69]

* * * * *

Q. (By Mr. Galliano): I will show you here General Counsel's Exhibit 9, which is a receipt given on the union's form, on 5/13/57. Can you read that in that photostat? A. Yes.

Q. Now——

A. This was a fine assessment.

Q. Do you know what those items are there?

A. Yes. The dues were paid at that time. It was credited on our ledger for January because——

Q. January of which year?

A. Of '57. (Continuing) —because when anybody comes after a checkoff, the company, we have a checkoff with the company, and if they come after the first—after the first week it is not deducted from their paychecks, and they have to [77] pay.

Mr. Karasick: Excuse the interruption, please, Mrs. Baltrun.

Perhaps this is a little late in stating the objection, but unless the purpose of the question is stated, I would like to object to a further answer on the part of the witness. The document in evidence speaks for itself. I don't know that a further explanation is needed from this witness.

(Testimony of Sonia Baltrun.)

Mr. Galliano: If I may suggest to you, I don't think that the document does speak for itself, because it is not fully explanatory as to what the January was, as to what the fine, the dollar, was for, what the assessment was for. I am trying to find out the whole situation in respect to this.

Trial Examiner: Well, does the General Counsel claim there is anything to be derived from the face of this document that supports his position as to the issue here?

Mr. Karasick: I am not claiming that because of this document the witness was discriminated against. I am claiming——

Trial Examiner: I think we might have an explanation. I don't know that it is material, but I like to know what this fine and what this assessment represent.

Q. (By Mr. Galliano): You have told us that the dues were for the—— [78]

A. The month of January.

Q. Of 1957. You have explained——

Trial Examiner: You told us about the dues.

Q. (By Mr. Galliano): Yes?

A. The fine was credited for the month of April, and I assume that that's——

Trial Examiner: Don't assume. Just what you know.

The Witness. All right.

A. It was credit for the month of April, because he evidently missed a meeting in April and he paid a fine for that meeting.

(Testimony of Sonia Baltrun.)

Q. (By Mr. Galliano): April of '57. This has nothing to do with the past. And then the assessment, the union has an assessment of \$1.00 a year per member.

Trial Examiner: That is called a——

The Witness: That is for '57 also.

Trial Examiner: That is called an assessment, then, that \$1.00?

The Witness: Yes.

Trial Examiner: What is the fine for, for failing to attend a union meeting—how much?

The Witness: A dollar. That was for April of 1957.

Q. (By Mr. Galliano): You will note, in this receipt, which is dated 5/13/57, the dues are credited for January. That is for some months previous? A. That is right. [79]

Q. To 5/13/57? A. Right.

Q. And this dollar, as you have told us, was for failure to attend a meeting? A. Yes.

Q. After he had gone back to work from the layoff? A. That is right.

Q. And he paid that, and then you told us about the assessment. A. Yes. [80]

* * * * *

Cross Examination

Q. (By Mr. Warner): Were you the one in the official capacity of a union officer who requested the dismissal of Mr. Molton?

(Testimony of Sonia Baltrun.)

A. Yes. I have written a letter to Mr. Reinold, asking that he be——

Q. Would you recognize the letter if you saw it?

A. Yes.

Q. Is this the letter? Would you recognize it?

A. Yes.

Q. That is your signature?

A. That is my signature.

Mr. Warner: Would it be possible to submit this in evidence?

Trial Examiner: It may be placed in evidence.

You may mark this as Company Exhibit No. 1.

(Thereupon, the document above referred to was marked Respondent Employer's Exhibit No. 1 for identification.)

Trial Examiner: Is there an objection to this letter?

Mr. Galliano: No objection, sir.

Mr. Karasick: No objection.

Trial Examiner: Received.

(The document heretofore marked Respondent Employer's Exhibit No. 1 for identification was received in evidence.) [83]

* * * * *

Cross Examination * * * * *

Q. (By Mr. Karasick): * * * Is it or is it not true that you were informed by union steward Edward Billie that Molton had requested a withdrawal from the union at the time of his layoff and was told that he would have to pay a dollar fine for non-

(Testimony of Sonia Baltrun.)

attendance at a union meeting in order to secure such a withdrawal?

A. I don't know whether I was informed by him or I asked him, but it could have been either way.

Q. But that knowledge did come to your attention, did it not, Mrs. Baltrun? [85]

A. That is right.

Q. And that is a correct statement, is it not?

A. That is correct.

Q. That Edward Billie—one way or another, you knew that Edward Billie had asked him this, right?

A. Yes. We issue withdrawals only to members in good standing.

Q. Yes, I will come to that in a moment. Then Molton refused to pay the fine at that time, is that right?

A. I don't know. He didn't refuse it to me.

Q. As far as you know, though, he didn't pay the fine. We will put it that way. Right?

A. Right.

Q. And he didn't get a withdrawal card?

A. Right.

Q. Had he paid the dollar fine for non-attendance at the union meeting, he would have gotten a withdrawal card?

A. If he had asked for it and would have paid, he would have.

Q. As you were saying just a moment before, it is the practice of the union to issue withdrawals

(Testimony of Sonia Baltrun.)

to members who are laid off by a company the union has a contract with as long as they are in good standing with the local?

A. I want to qualify this by saying that according to a general rule in the union, we only should issue withdrawals to those leaving the industry, not on layoffs. We do that [86] as a courtesy to the members so they won't have to pay dues, that is all.

Trial Examiner: I am glad that came into it, because I have been reading that article in the by-laws and that is precisely what that article says. It says: "leave the industry."

Mr. Karasick: The witness has explained the practice of the union.

The Witness: We do that as a courtesy to those in good standing, issue withdrawals so they won't have to tender their dues right along. Sometimes the layoffs may be 30 days and other times they may be six months. We feel it is a burden to hold them to that duty of keeping up their dues, so we do that as a courtesy to our members when they are laid off.

Q. (By Mr. Karasick): I see. Now, in order to be in good standing, I think you have already indicated the dues and fines and assessments of a member have to be paid up to date.

A. In order to get a withdrawal on the basis we would give one. If they had left the industry, this question would not have arisen; they would have gotten a withdrawal because they would have left the industry. But in order to hold them in good

(Testimony of Sonia Baltrun.)

standing while they are on a layoff, we give them withdrawals as a courtesy, if they are paid up.

Q. I think you have already testified, have you not, that [87] a member of the local who has a withdrawal card need not pay dues during the period of his layoff?

A. That is right. If they get a withdrawal, they do not.

Q. That is right. And then they may be subsequently reinstated into the local without payment of any initiation fee or reinstatement fee, if they have a withdrawal card, is that right?

A. That is right. That is the purpose of a withdrawal.

Q. If Molton here had secured a withdrawal card in accordance with the regulations you have outlined, there wouldn't have been this problem of the back dues or the probable reinstatement fee, is that correct?

Mr. Galliano: We object to that as being conjectural. It is not within the issues.

Mr. Karasick: I think it is according to the practices of the union.

Trial Examiner: I suppose her position qualifies her to answer as to what is a standard practice of the union. She may answer.

A. Well, that is our standard practice, I should say.

Q. (By Mr. Karasick): Yes, if a member—

A. If they are in good standing, we give them

(Testimony of Sonia Baltrun.)

a courtesy withdrawal, those who do not leave the industry.

Q. In other words, on a layoff, if he had had a withdrawal card and he was reinstated by the company, he would start [88] paying dues at that time, but he would not have to pay any back dues or any reinstatement fee, isn't that correct?

A. That is right.

I would just like to qualify that. This is only a practice in our local. Some of the other unions and locals do not give them unless they leave the industry. They don't give them. They have to tender their dues right along.

Q. So the practice varies from local to local?

A. Yes.

Q. And your local has followed the practice you have just testified about?

A. Yes; if they are in good standing, we do issue them a withdrawal card.

Q. I am right, am I not, in saying, or asking you, is this correct, that only members of the local are permitted to attend union meetings?

A. That is correct.

Q. During the period of Molton's layoff he was not expelled by the union, was he?

A. He was dropped from the rolls for non-payment of dues.

Q. There is a formal proceeding for expulsion, is there not, provided for in the by-laws?

A. No. It is not an expulsion. It is just dropping from the rolls. Expulsion means if a person

(Testimony of Sonia Baltrun.)

does something that the union may have a trial over, then they expel them, if they see [89] fit. If a member does not pay dues, he is just dropped after a certain period.

Q. Does he still remain a member?

A. No. He is dropped from the rolls after a certain period; according to the by-laws, three months of non-payment is suspension, four months expulsion, but we don't officially expel anyone. They are just dropped because they do not respond, and they are dropped after the fourth month. However, we do have—pardon me, I do have a practice in that particular local, I happen to be also financial secretary of the local and I do send letters to every member in the beginning when they leave, either on the layoff or discharge or whatever it may be, send them a letter asking them to produce their book so that they can get a withdrawal card. They have to turn in their book so that we can check it, their dues book. And also after we check their book we may issue the withdrawal or we may say: "You owe dues," whatever it may be. Now, that is the practice of this particular local.

Q. (By Mr. Karasick): After Molton was finally discharged—when was it, July 9th, of last year—the union then expelled him from membership, did it not?

A. No, we did not; but we dropped him.

Q. You dropped him?

A. There was no regular expulsion.

(Testimony of Sonia Baltrun.)

Q. I see. But he wasn't considered a member any longer? [90]

A. No. After the fourth month he is not a member. [91]

* * * * *

Q. * * * Now, when Molton came back to work for the company in January of 1957, last year, was he regarded as a member in good standing even though he hadn't paid these back dues?

A. No, he was not.

Q. And he wouldn't have been until he was paid up, is that right? [95]

A. Not in good standing.

Q. Would he have been a member?

A. No, not until he had paid his reinstatement or the new initiation fee.

Q. And he never did? A. No.

Q. I think you testified that only members attend union meetings. Correct? A. Correct.

Q. Why then was Molton fined for non-attendance of a union meeting in April 1957 when you didn't consider him as a member when he hadn't paid his fees?

Trial Examiner: Mr. Karasick—

Mr. Karasick: That is his credibility, in terms of her testimony, sir.

Trial Examiner: How does credibility come into this?

(Testimony of Sonia Baltrun.)

Mr. Karasick: The witness has been asked, over my objection, as to an explanation of a receipt. She gave the explanation, as you recall. I am entitled to explore that, in terms of what she has now testified.

Trial Examiner: She testified as to the receipt, that one item on it was a fine for failure to attend a union meeting.

Mr. Karasick: In April 1957.

Trial Examiner: That is correct.

Mr. Karasick: Now I am entitled to show, as I have [96] already demonstrated on this record, according to the testimony of this witness, this individual wouldn't have——

Trial Examiner: You propose to show that it wasn't for non-attendance at a union meeting in 1957, since he hadn't paid his fees, is that correct?

Mr. Karasick: That is it. That is the time she says, certainly.

Trial Examiner: All right, if that is your purpose, the witness may answer the question.

Trial Examiner: You understand, I still don't think it has any materiality whatever. I am going to humor you on this, as far as we seem to find it necessary.

Mr. Karasick: I appreciate your indulgence.

A. In the first place, I don't think anyone forced him or asked him to pay those particular items at

(Testimony of Sonia Baltrun.)

that time. He paid them voluntarily. Secondly, I believe that the man was being, was, on a checkoff, automatically reinstated by the company. When they come back from a layoff, because they have these checkoff papers, they reinstate them automatically, every one. The company does not know until we go to them whether they are in good standing with us or not. So in the meantime we were dickering ever since January for him to pay up and get himself reinstated. That is the answer.

Q. (By Mr. Karasick): The company, of course, does not determine who is or who is not a member of the union, does it? [97]

A. No. That is why they had the checkoff right along for him, with the exception of the month of January.

Q. Yes. That is the only answer? That is the best answer you have to give us?

A. That is right. And we were dickering for him to get himself fully reinstated.

* * * * *

Q. (By Mr. Karasick): Molton's dues were checked off by the company beginning in February and running through the month of July, is that correct?

A. Yes, sir.

Q. And then he paid the January dues, as evidenced by this receipt that has already been shown, right?

A. Right. [98]

* * * * *

SONIA BALTRUN

a witness recalled for and on behalf of the Respondent Union, having been previously sworn, was examined and testified further as follows:

Redirect Examination [104]

* * * * *

Q. (By Mr. Galliano): With respect to Molton going to a steward for a withdrawal card, did you get any information in respect to that?

A. I got information from Ed Billie, who was the shop chairman at the time, that there was some discussion with Molton on his withdrawal card and that at this discussion Molton made a statement that he does not want a withdrawal card, he is not coming back to work. [109]

* * * * *

Trial Examiner: Where is this steward that is reputed to have told her these things? Is he available?

Mr. Galliano: He is at work.

Trial Examiner: You don't intend to present him?

Mr. Galliano: I don't like to delay the hearing. If arrangements could be made for him to get off of work and get over here immediately, I would very much like to have him.

Trial Examiner: Well, it is a matter of your discretion as to what you put on.

Mr. Galliano: On the basis of the record, I am satisfied with the record on the proof of the matter which I wanted to prove.

Trial Examiner: That is entirely a matter of your discretion. [114]

* * * * *

LLOYD E. BROWN

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. (By Mr. Karasick): Mr. Brown, what is your position with the company?

A. Paymaster, paymaster there. [115]

* * * * *

Trial Examiner: Did you have knowledge from this union representative that this employee was behind in the sense of both dues and fines?

The Witness: Yes, I did. I hear that from Mrs. Baltrun, voluntarily on her part. I mean I never ask those questions, myself, because I have no concern with them.

Q. (By Mr. Karasick): And then on July 9th finally the [120] foreman came to you and told you the union was demanding Molton's discharge and asked you to make out a check to pay him up to and through that day, or up to that day, isn't that right?

A. That is correct. [121]

* * * * *

HAROLD HARNACK

called by and on behalf of the General Counsel, on rebuttal, being first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. (By Mr. Karasick): You are employed by National Automotive Fibres, Inc., are you not?

A. That is right. [130]

* * * * *

Q. What is your job?

A. I am a foreman.

* * * * *

Q. You recall the discharge of Molton, do you not? A. Yes, I do.

Q. I mean, the incident itself?

A. Correct. [131]

* * * * *

Q. (By Mr. Karasick): Mr. Harnack, about a week before this incident we are talking about, is it correct that Gus Billie, a union steward, told you that Molton had failed to get a withdrawal card during a layoff in July 1956?

* * * * *

A. He had mentioned it only because it was common knowledge throughout the plant that there was some disagreement between Molton and his union. And in the manner of conversation he spoke about it and he said that there would be a meeting to see if they could get together and, if not, I guess, Molton would be discharged for that reason. But he

(Testimony of Harold Harnack.)

didn't come to me [132] officially as a union steward, giving information as a man working for the company. It was strictly conversation.

* * * * *

Q. He told you about this withdrawal and he told you, did he not, that if Molton hadn't been so stubborn about not paying a dollar fine he would have had the withdrawal?

A. That would be about the contents of the conversation.

Trial Examiner: You used the word "incident." Did you establish what incident in your preliminary question?

Mr. Karasick: Yes. The incident was the discharge of Molton and this was about a week before.

Trial Examiner: As long as the witness is clear.

Mr. Karasick: I think the witness understands.

Q. (By Mr. Karasick): Do you not?

A. I am not aware of the whole incident, but I am aware of the conversation, by talking to Billie.

Q. Before the discharge? A. That is right.

Q. Then, on the morning of the discharge itself you were acting as Molton's foreman because his foreman was on vacation? A. That is right.

Q. Johnny Cambria was his regular department foreman?

A. That is right. I had pad assembly and Cam-

(Testimony of Harold Harnack.)

bria had cotton garnatt and was Molton's supervisor. And he was on vacation so I doubled over and took both jobs.

Q. On that morning Mr. Chartier—who is the superintendent of the plant, is he not?

A. That is right.

Q. (Continuing) —talked to you about Molton and the ultimate discharge, did he not?

A. No. He called me on the phone and said there was a meeting that had been that morning, or the day prior, I don't know, but the union requested Molton's termination because of a dues situation. Now, that is as familiar as I was with it, through Mr. Chartier. And it's proper procedure for the foreman to make out the termination rate sheet. And, of course, I [134] was informed to do that because that was the procedure.

* * * * *

Q. Now, this is correct is it not: When Mr. Chartier talked to you he told you that Molton would have to be terminated because he refused to pay union dues and some fines and assessments that related to his failure to attend a union meeting?

A. He said, "At the request of the union, we must terminate"—

Q. Yes? A. Right.

Q. But with that exception, that is correct?

A. That is the essence—correct. [135]

* * * * *

(Testimony of Harold Harnack.)

Q. The union was demanding that, according to Mr. Chartier, that Molton be discharged because he had failed to pay dues and because he had failed to pay assessments and fines that arose out of a failure to attend a union meeting, isn't that correct?

A. That could be correct. I would say it is correct as well as I can remember, right.

Q. And this is what he told you on that occasion?
A. That is right. [137]

* * * * *

GENERAL COUNSEL'S EXHIBIT No. 9

[Receipt]

Date 5-13-57

A 15805

Local No. 146

Textile Workers Union of America

Affiliate of the C.I.O.

Received from Curtis Molton 1914

check for five & no/100 Dollars

Initiations \$. . . .

Dues Jan. \$3.00

For Fine \$1.00

Asst. \$1.00 Total \$5.00

Union Label Form C20 /s/ J. Clark.

GENERAL COUNSEL'S EXHIBIT No. 14

By-Laws
Textile Workers Union of America

. * * * * *

ARTICLE VI

Membership

* * * * *

Dues and Initiations

Section 2. (a) The intiation fee for membership in this local union shall not be less than \$2.50 for new groups and \$10.00 for those groups under agreement.

(b) Each member shall pay dues of not less than \$24.00 per year, payable at the rate of \$2.00 per month. Members who are employed or who are employed only part time, working at least a day in any month must pay dues in advance for that month.

(c) A member shall cease to be in good standing in this local union and in the Textile Workers' Union of America if he or she is more than three months in arrears in the payment of dues and assessments. To reinstate themselves after that period member must pay all dues and assessments in full at the time of initiation fee, at the time of reinstatement. No part payment can be made. Such a member must appear before Executive Board to explain their negligence.

(d) A member may be expelled after notice if by the 10th of the fourth month such a member is

General Counsel's Exhibit No. 14—(Continued)

more than four months in arrears in the payment of dues and assessments. A member who has been expelled for non-payment of dues or assessments may be reinstated only upon payment of the regular initiation fee together with all monies due at the time of the expulsion, unless otherwise ordered by the local Executive Board.

ARTICLE VII

Transfers and Withdrawals

Section 1.

* * * * *

(b) Any member who is in good standing in this local union may withdraw from membership upon leaving the textile industry and shall receive a withdrawal card. Thereafter, the withdrawal member shall lose all rights and privileges of a membership of this local union, and the Textile Workers' Union of America, and shall be exempt from the payment of dues and assessments. A member who has withdrawn may subsequently be reinstated without payment of initiation fee, provided, however, he or she reinstates themselves before one year from date withdrawal card is issued or provided, the withdrawal card is renewed at the expiration date by paying one month's dues. During such a period that a member is on withdrawal he must not engage in any activities against the best interests of the local union and Textile Workers' Union of America.

* * * * *

GENERAL COUNSEL'S EXHIBIT No. 16

AGREEMENT

This agreement is made and entered into this first day of May 1956 by and between the Oakland Division, National Automotive Fibres, Inc., at 2230 Livingston Street, Oakland 6, California, hereinafter called "Company" and the Textile Workers Union of America, affiliated with the American Federation of Labor and the Congress of Industrial Organization, hereinafter called the "Union."

* * * * *

Article II—Recognition and Conditions
of Employment

* * * * *

B. Membership in Union.

(1) New workers not enrolled in the Union shall be requested to make application for membership within six (6) weeks if retained in employment, and to sign an application card in the Union during the first week of employment.

(2) Membership in the Union, effective six (6) weeks after the first Monday following the date of hire, shall be a condition of employment; provided, that the Company shall not be obligated hereunder to discharge or discriminate against any employee for non-membership in the Union:

(a) If the Company has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or,

General Counsel's Exhibit No. 16

(b) If the Company has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership.

* * * * *

[Endorsed] No. 16473. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. National Automotive Fibres, Inc., and Textile Union Local No. 146, Textile Workers Union of America, AFL-CIO, Respondents. Transcript of Record. Petition for Enforcement of Order of the National Labor Relations Board.

Filed: June 23, 1959.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
For the Ninth Circuit

No. 16473

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

NATIONAL AUTOMOTIVE FIBRES, INC.;
AND TEXTILE UNION LOCAL No. 146,
TEXTILE WORKERS UNION OF AMER-
ICA, AFL-CIO, Respondents.

PETITION FOR ENFORCEMENT OF AN
ORDER OF THE NATIONAL LABOR
RELATIONS BOARD

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151 et seq., as amended by 72 Stat. 945), hereinafter called the Act, respectfully petitions this Court for the enforcement of its Order against Respondents, National Automotive Fibres, Inc. (hereinafter called Respondent Company) its agents, successors and assigns, and Textile Workers Union of America, AFL-CIO, (hereinafter called Respondent Union) its officers, representatives, agents, successors and assigns. The proceeding resulting in said order is known upon

the records of the Board as Case Nos. 20-CA-1371, and 20-CB-538.

In support of this petition the Board respectfully shows:

(1) Respondent Company is a Delaware corporation engaged in business in the State of California, and Respondent Union is a labor organization engaged in promoting and protecting the interests of its members in the State of California, both within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on October 14, 1958, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent Company, its agents, successors, and assigns, and to the Respondent Union, its officers, representatives, agents, successors, and assigns. On the same date, the Board's Decision and Order was served upon Respondents by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondents' counsel.

(3) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceeding before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon the Respondents and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing in whole said Order of the Board and requiring Respondent Company, its agents, successors, and assigns and Respondent Union, its officers, representatives, agents, successors and assigns to comply therewith.

Dated at Washington, D. C. this 12th day of May, 1959.

/s/ THOMAS J. McDERMOTT,
Associate General Counsel, Na-
tional Labor Relations Board.

[Endorsed]: Filed May 15, 1959. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

ANSWER

(1)

Now the respondent Company answers the complaint in the above entitled matter.

Admits to the allegations of paragraphs 1, 2, 3, and 4 of the said complaint with reservations listed below.

Certain divisions as listed in the original complaint are no longer owned or operated by the Company, one of which is the Oakland Division.

(2)

Denies each, every and all generally and specifically the allegations of paragraphs 5, 6, 7, 8, 9, and 10 of the said complaint with reservations listed below.

The respondent Company on demand of the respondent Union did discharge Curtis Molton for failure to pay Dues and an Initiation fee uniformly required as a condition of acquiring or retaining membership in the respondent Union, pursuant to the lawful collective bargaining agreement in effect between the respondent Union, and the respondent Company.

May 29, 1959.

/s/ N. A. WARNER,
N. A. Warner,
Industrial Relations, NAFI
Corporation.

[Endorsed]: Filed June 1, 1959. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

ANSWER

As a respondent Union, wish to answer the complaint in the above Case No. 20-CB-538, against the said Union.

We herewith deny allegations against the Union, except, the Union did cause discharge of Curtis Molton for failure to pay dues and/or Initiation fees uniformly required as a condition of retaining membership in the Union.

This is in conformity with the lawful collective bargaining agreement then in effect between the Union and the respondent Company.

/s/ SONIA BALTRUN,
Textile Workers Union of A. Local fin. sec. and
Joint Board Business Manager.

[Endorsed]: Filed June 2, 1959. Paul P. O'Brien,
Clerk.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH
PETITIONER INTENDS TO RELY

The National Labor Relations Board, petitioner herein, in accordance with the rules of this Court, hereby states the following as the points on which it intends to rely herein:

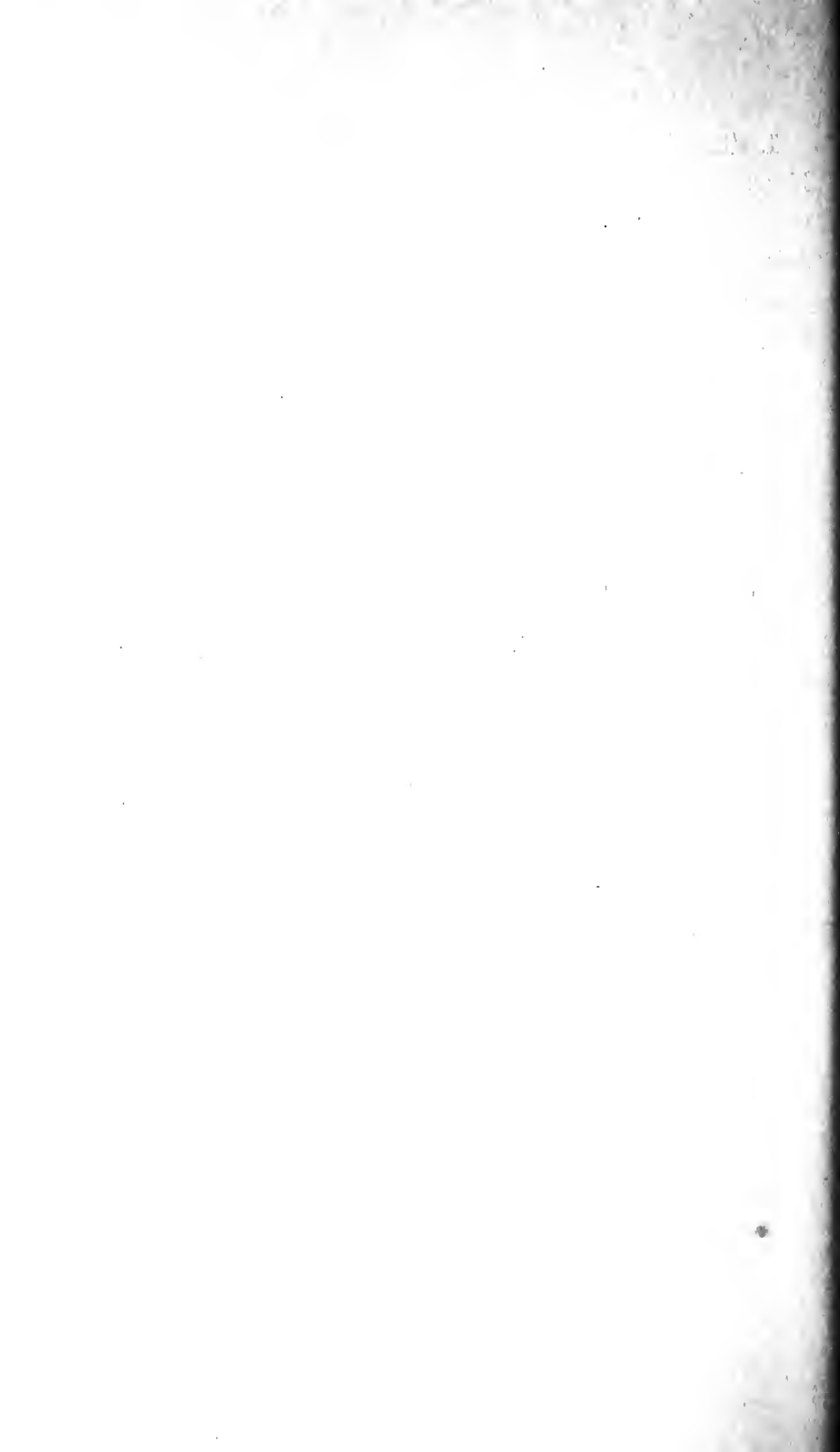
1. The Board properly held that the Union violated Section 8 (b) (2) and (1) (A) of the Act by causing the Company to discharge an employee for failure during a layoff period to pay dues which would not have been imposed had he paid a union fine.

2. The Board properly held that the Company has reasonable grounds for believing that the employee it discharged at the Union's behest had been suspended from union membership for reasons other than a failure to tender "periodic dues" "uniformly required."

Dated at Washington, D. C., this 19th day of June, 1959.

/s/ MARCEL MALLET-PREVOST,
Assistant General Counsel, Na-
tional Labor Relations Board.

[Endorsed]: Filed June 23, 1959. Paul P. O'Brien, Clerk.



No. 16478 ✓

**United States
Court of Appeals**
for the Ninth Circuit

DONALD W. FORMHALS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Transcript of Record

**Upon Appeal from the United States District Court
for the Southern District of California
Central Division**

FILED
SEP 25 1959
PAUL P. O'BRIEN, CLERK



No. 16478

United States
Court of Appeals
for the Ninth Circuit

DONALD W. FORMHALS,

Petitioner,

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UNITED STATES OF AMERICA,

Respondent.

Transcript of Record

Upon Appeal from the United States District Court
for the Southern District of California
Central Division



INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Attorneys, Names and Addresses of.....	1
Certificate by the Clerk.....	107
Indictment	3
Judgment and Commitment.....	8
Minute Entries:	
July 21, 1958.....	5
July 22, 1958.....	5
Notice of Appeal.....	10
Order Appointing Psychiatrist.....	6
Report of Edwin E. McNiel, M.D.....	11
Statement of Points on Appeal.....	110
Verdict	7
Transcript of Proceedings.....	23
Instructions to the Jury.....	104
Witnesses:	
Formhals, Donald W.	
—direct	70
—cross	85

INDEX

PAGE

Witnesses—(Continued):

Halverson, Dr. Glen

—direct	45
—cross	51
—redirect	56

Lynch, Willard W.

—direct	28, 97
—cross	103

McNiel, Dr. Edwin E.

—direct	57
—cross	64

Wilson, Norman H.

—direct	24
—cross	26

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

ANDERSON, ADAMS & BACON,
4100 North Rosemead Boulevard,
Rosemead, California;

THOMAS E. KELLETT,
1310 Wilshire Boulevard,
Los Angeles 17, California.

For Appellee:

LAUGHLIN E. WATERS,
United States Attorney;

ROBERT J. JENSEN,
Assistant U. S. Attorney,
Chief, Criminal Division;

WM. B. OSBORNE,
Assistant U. S. Attorney,
600 Federal Building,
Los Angeles 12, California.



United States District Court for the Southern District of California, Central Division

No. 26930—CD

February, 1958, Grand Jury

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DONALD W. FORMHALS,

Defendant.

INDICTMENT

(U.S.C., Title 18, Sec. 1709—Embezzlement of Mail)

The grand jury charges:

Count One

(U.S.C., Title 18, Sec. 1709)

On or about June 25, 1958, in Riverside County, California, within the Central Division of the Southern District of California, defendant Donald W. Formhals, a Postal Service employee, embezzled a letter addressed to Herbert W. Armstrong, "The World Tomorrow," a nation-wide broadcast, P. O. Box 111, Pasadena, California, with return address of Jessie M. Hollifield, 356 N. Hemet Street, Hemet, California, which letter had been intrusted to him and which had come into his possession intended to be conveyed by mail.

Count Two

(U.S.C., Title 18, Sec. 1709)

On or about June 25, 1958, in Riverside County,

California, within the Central Division of the Southern District of California, defendant Donald W. Formhals, a Postal Service employee, embezzled a letter addressed to Cal Farley's Boys Ranch, P. O. Box 1890, Amarillo, Texas, with return address of Mr. and Mrs. Louis Parker, 325 South Buena Vista, Hemet, California, which letter had been intrusted to him and which had come into his possession intended to be conveyed by mail.

Count Three

(U.S.C., Title 18, Sec. 1709)

On or about June 25, 1958, in Riverside County, California, within the Central Division of the Southern District of California, defendant Donald W. Formhals, a Postal Service employee, embezzled a letter addressed to Air Mail from God Mission, Inc., Post Office Box 2013, Los Angeles 54, California, with return address of Mrs. Jessie Hollifield, 356 N. Hemet Street, Hemet, California, which letter had been intrusted to him and which had come into his possession intended to be conveyed by mail.

A True Bill.

/s/ GEORGE E. BATTLES,
Foreman.

/s/ LAUGHLIN E. WATERS,
United States Attorney.

[Endorsed]: Filed July 2, 1958.

[Title of District Court and Cause.]

MINUTES OF THE COURT—JULY 21, 1958

Present: Hon. Peirson M. Hall, District Judge.

Proceedings: For arraignment and plea.

Defendant is arraigned and states his true name is as set forth in the Indictment.

On the Court's own motion It Is Ordered that cause is continued to July 22, 1958, 10 a.m., for plea, and that defendant secure counsel.

JOHN A. CHILDRESS,
Clerk.

By /s/ S. W. STACEY,
Deputy Clerk.

[Title of District Court and Cause.]

MINUTES OF THE COURT—JULY 22, 1958

Present: Hon. Peirson M. Hall, District Judge.

Proceedings: For plea.

Defendant pleads not guilty to each of the three counts of the Indictment.

It Is Ordered that cause is set for trial Aug. 12, 1958, 10 a.m.

JOHN A. CHILDRESS,
Clerk.

By /s/ S. W. STACEY,
Deputy Clerk.

[Title of District Court and Cause.]

ORDER APPOINTING PSYCHIATRIST

The defendant Donald W. Formhals having appeared in this Court on July 22, 1958, and entering a plea of not guilty to all counts of Indictment No. 26930—CD, charging him with violations of 18 U.S.C., Section 1709, Embezzlement of Mail, and the matter having been set for trial on August 12, 1958; and on August 12, 1958, the question of the ability of the defendant Donald W. Formhals to presently defend himself and assist his counsel in the preparation and presentation of his defense and said defendant's mental condition at the time of the alleged defense, having been raised in open court on motion of the plaintiff and agreed to by counsel for the defendant; and the trial setting of August 12, 1958, having been then vacated due to the hospitalization of the defendant; and the defendant being now released from the hospital and the matter set for trial on February 17, 1959, in the District Court of Southern District of California, Central Division;

It Is Ordered that Dr. Edwin E. McNiel be, and he is hereby appointed to examine the defendant and render to the above Court a report of his examination and findings as to the present competency of the defendant with specific reference to his ability to presently defend himself, or to assist his counsel in the preparation and presentation of his defense, and, as to the defendant's mental condition at the time of the commission of the alleged offense.

It Is Further Ordered that the defendant makes himself available for examination by Dr. Edwin E. McNiel on or before February 13, 1959.

It Is Further Ordered that such examination and report shall be at the expense of the United States Government.

It Is Further Ordered that the original of this report shall be forwarded to the Honorable Ben Harrison, Judge of the above-entitled Court, and a copy thereof to respective attorneys for the plaintiff and the defendant.

Dated: This 4th day of Feb., 1959.

/s/ PEIRSON M. HALL,
United States District Judge.

Approved:

/s/ HARRY L. HUPP,
Attorney for the Defendant.

/s/ WM. BRYAN OSBORNE,
Attorney for the Plaintiff.

Certificate of Service by Mail attached.

[Endorsed]: Filed February 4, 1959.

[Title of District Court and Cause.]

VERDICT

We, the Jury in the above-entitled cause, find the defendant, Donald W. Formhals, guilty, as charged

in Count One of the Indictment, and guilty, as charged in Count Two of the Indictment, and guilty, as charged in Count Three of the Indictment.

Dated: February 19, 1959.

/s/ CARL V. GEBHART,
Foreman of the Jury.

[Endorsed]: Filed February 19, 1959.

United States District Court for the Southern District of California, Central Division

No. 26930—Criminal

UNITED STATES OF AMERICA

vs.

DONALD W. FORMHALS

JUDGMENT AND COMMITMENT

On this 9th day of March, 1959, came the attorney for the government and the defendant appeared in person and by his appointed counsel, Harry L. Hupp, Esq.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and verdict of guilty on Counts One, Two and Three of 3-count indictment, of the offenses of having on or about June 25, 1958, in Riverside County, California,

while a Postal Service employee, embezzled letters intrusted to him and which had come into his possession intended to be conveyed by mail, in violation of U. S. Code, Title 18, Section 1709, as charged in the Indictment and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of six months on each of the three counts, to run concurrently.

It Is Adjudged that the bond of the defendant is exonerated.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ WM. M. BYRNE,

United States District Judge.

[Endorsed]: Filed March 9, 1959.

[Title of District Court and Cause.]

NOTICE OF APPEAL

I.

The Appellant is Donald W. Formhals, and his address is 1346 East Mayberry, Hemet, California.

II.

The attorneys for Appellant are Anderson, Adams & Bacon and Thomas E. Kellett, whose address is 4100 North Rosemead Boulevard, Rosemead, California.

III.

The appellant was charged with three counts of having, on or about June 25, 1958, in Riverside County, California, while a postal service employee, embezzled letters entrusted to him which had come into his possession, intended to be conveyed by mail, in violation of U. S. Code, Title 18, Section 1709.

IV.

On March 9, 1959, judgment was entered whereby it was adjudged that Appellant was guilty as charged and convicted of all three counts, and that he has been committed to the custody of the Attorney General, or authorized representative, for imprisonment for a period of six months on each of the three counts, the sentence on each count to run concurrently.

V.

The Appellant is presently confined at the Federal Correctional Institution, Terminal Island, California.

VI.

The above-named Appellant hereby appeals to the United States District Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated: March 18, 1959.

ANDERSON, ADAMS &
BACON and
THOMAS E. KELLETT,

By /s/ ROBERT L. BACON,
Attorneys for Appellant.

Proof of Service by Mail attached.

[Endorsed]: Filed March 19, 1959.

Edwin Ewart McNiel, M.D.
3875 Wilshire Boulevard
Los Angeles 5, California
DUnkirk 9-6493

February 13, 1959.

Honorable Ben Harrison
United States District Judge
600 Federal Building
Los Angeles 12, California

In re: Donald W. Formhals, Case No. 26930
—CD.

Your Honor:

In response to an order from Judge Peirson M. Hall appointing me as a psychiatrist to examine Donald W. Formhals, I proceeded to examine him on February 10, 1959, at my office. Judge Hall ordered that the original copy of my report be forwarded to you.

Personal History:

The subject is a thirty-four year old, white male, who stated he was born December 11, 1924, in Lewis, Iowa. He is a high school graduate. He came to California in August, 1949. He served four years in the United States Marine Corps and six years in the United States Air Force. He has worked as a driver's license clerk for the Iowa State Highway Patrol; he has also done restaurant work and construction work. Since June, 1954, he worked as a mail clerk and carrier for the United States Post Office at Hemet, California, until his arrest in June, 1958.

Marital History:

On December 23, 1950, he married Ruby Gordon. He has a step-son, now age sixteen years, by his wife's first marriage. There are no children by this marriage. He is still living with his wife. He stated that his marriage has gone "fine."

Family History:

Father: William Formhals. He is living in Omaha, Nebraska, at the age of fifty-six years. He

is a caretaker for a big estate. He has remarried twice.

Mother: Eleanor Chubbick. She is living in Atlantic, Iowa, at the age of fifty-four years. She and the subject's father were divorced when the subject was two years of age. She has remarried.

Siblings: The subject is the older of two in his sibling group. He has one full sister.

The subject stated that his maternal grandmother was a patient in the Iowa State Hospital. He thinks that she entered the hospital when she was thirty or forty years of age. He also stated that he thinks she recovered but that no one would take her out of the hospital. There is no other family history of nervous or mental disease.

Medical History of Defendant:

He had the measles, mumps, chicken-pox, scarlet fever, whooping cough and pneumonia in childhood. He stated that he has never had an operation. He sustained fractures of three or four ribs in 1945 while in the Service. Also, he sustained fractures of some of his fingers while playing ball. In August 30, 1950, he was involved in an auto accident. He stated that he suffered a concussion and bruises and was rendered unconscious for about an hour. He stated that he thinks he has recovered from that injury. He said that he had a pinched nerve from the rib injury and had some paralysis of the right side. This was corrected. He also stated that he had

some dizzy spells beginning two or three weeks after the head injury. He said that he did not seem to respond to the orders of his superior officer at March Field and he was seen by a Dr. Rudin. He said that he is now at the California State Department of Mental Hygiene. The subject stated that he quit going to the doctor after three or four sessions. He said that he has never had any fits, convulsions or epileptic attacks. He also stated that he has had no other head injury with unconsciousness and he thinks that he has now recovered from the effects of the head injury. He said that he has "nerves" and headaches. He thinks the headaches are due to the "nervousness." He stated that the headaches occur every day. They have been in the frontal area "right above my eyes." He said that he takes bufferin for his headaches. He said, "Bromo-Seltzer helps more than anything." He also takes Probanthine and Phenobarbital which he says helps the headaches. He said, "Most of the headaches go with my stomach trouble. If I have one, I have the other. They tried to fit me with glasses and I've had three pair of glasses. They help if I'm sitting and reading for the past three or four years." He stated that he has never had any venereal disease and has never been a patient in a mental hospital. He stated that he entered the Veterans' Administration Hospital in Long Beach on September 3, 1958, for treatment of a gastric ulcer. He stated that he has known that he had an ulcer since 1948 or 1949. He was in the Veterans' Ad-

ministration Hospital until November 13, 1958. He returned there on November 30, 1958, and left there December 24, 1958. He had atropine, gelusil and a special diet. He stated that he did not have an operation on his stomach. He stated that he also has internal and external hemorrhoids. While in the Service he was in a hospital from November, 1953, to January, 1954, with hepatitis. He said that he has had no other serious illnesses or accidents.

Previous Arrests:

None.

Service Record:

In February, 1943, he voluntarily enlisted in the United States Marine Corps. His highest rating was that of Corporal. He spent thirty months in the Western Pacific in active combat in landings. He received an honorable discharge in February, 1947. In March, 1948, he voluntarily enlisted in the United States Air Force. His highest rank was Staff Sergeant. In June, 1954, he received an honorable discharge. He did office work and all his service was in the United States. He stated that he had no serious disciplinary difficulties while he was in the Service. He said that there was a minor problem which worked out.

Use of Alcohol and Drugs:

He denied ever having used drugs or marijuana. He stated that he used to use alcoholic beverages

socially. He said that he has not used alcoholic beverages during the last six years.

Present Mental Status:

(a) Orientation: He was oriented for time and place.

Question: "What is the date?"

Answer: "February 10, 1959."

Question: "What is this address?"

Answer: "3875 Wilshire Boulevard."

(b) Manner, attitude, demeanor and appearance, co-operativeness:

The subject was quiet, pleasant and co-operative. He answered questions promptly and relevantly.

(c) Delusions and hallucinations:

Careful inquiry was made as to the existence at any time of delusions or hallucinations. No history of delusions or hallucinations was elicited.

(d) Emotional reactions:

At the time this man was examined he was not pathologically elated or depressed. No evidence of dissociation was noted.

(e) Insight into his present situation:

Question: "Why are you before the Court at this time?"

Answer: "Supposedly embezzlement of mails—that's what the charge is."

Question: "What do they say you did?"

Answer: "The charge reads 'Removed two dollars from a letter in the outgoing mail.'"

Question: "Is there only one count?"

Answer: "They say there were three letters removed from the mail."

Question: "When was that supposed to happen?"

Answer: "June 25, 1958."

Question: "Did the postal inspectors approach you when you had the mail on your person?"

Answer: "Yes, I was sitting on the toilet in the post office in Hemet with a bunch of these letters in my hand."

Question: "Was that on June 25, 1958?"

Answer: "Yes."

Question: "Did you know what you were doing at that time?"

Answer: "No. I didn't. I remember leaving for the bathroom but if I opened any mail I never knew it."

Question: "What time of the day was this?"

Answer: "I started casing the outgoing mail at 2:30 p.m. It was some time after that."

Question: "Was it about a half hour or an hour after that?"

Answer: "Probably about an hour after I started."

Question: "During that hour, from the time you started to case the mail until the inspectors approached you, did you know what you were doing?"

Answer: "Yes, I'd been casing the mail for ten minutes or so and one of these diarrhea spells hit me and I went to the bathroom. I had to go again. I was nervous and upset. I had been in an argu-

ment with the Postmaster. I was dizzy and upset. I started for the bathroom and I layed the mail down that I had in my hand. I flushed the toilet once. I was sitting there. These two inspectors came out of a closet there. I'd layed the letters down on the sink. He grabbed the mail and asked me why I was in there with mail. I told him I'd been sick. He said, 'Let's go in the Postmaster's office.' I was upset and bawling and trying to find out what it was all about. They asked me if I'd like to go around on the outside so I wouldn't have to be going in front of people. In the Postmaster's office they questioned me about where I was born and my years in the Service and when I started stealing from the mail. I told them I never had done that. They talked to each other. He asked me what I would do if they let me go. I pointed my finger at my head like I would shoot myself. Then I promised them I would go home. I sat out in the car with my head on the steering wheel. He came and talked with me. Finally I started home. On the way I stopped and sat in the car and cried. I went home and my wife could see I'd been crying and I couldn't make up my mind to tell her and what to say. This man finally called at 2:30 a.m. and told us to come to a motel. He had me sign papers and told me to appear before the Commissioner in Riverside. He talked for a while and finally I got quieted down and we drove home. The next day we went to Riverside. I went before the Commissioner.

"Later we came to Los Angeles and went before a Judge. Then I went all to pièces. I couldn't get

settled down so that I could talk any sense to my attorney. I had diarrhea and anemia and nervousness. I kept having confused spells. Finally, they got me into the hospital in Long Beach.”

Question: “Today is your mind clear?”

Answer: “Oh, in a way. I’m just nervous and upset. My memory isn’t any good any more. When I talk, I just wander off.”

Question: “What isn’t clear?”

Answer: “Things I should remember—like my dad’s and mother’s birthday and my sister’s. I just haven’t got it any more.”

Question: “In what way is your mind not clear today?”

Answer: “I don’t know. I don’t know how to explain it.”

Question: “Today do you think you know the difference between right and wrong?”

Answer: “Well, yes.”

Question: “Do you think you are able to cooperate with your attorney in the preparation and conduct of your defense?”

Answer: “I have no choice, but I’m sure I’ll break down and cry. I just get so no one can talk to me. When I get like that, my wife just walks away from me. I’ve done a lot of silly things. I’ve threatened my wife and done a lot of stuff like that.”

Question: “Do you think you knew what you were doing on June 25, 1958, between 2:00 p.m. and 4:00 p.m.?”

Answer: “I certainly don’t. I couldn’t have.”

Question: “That doesn’t make sense does it?”

Answer: "You don't understand."

Question: "You told me above a detailed description of a lot of things that happened during those two hours didn't you?"

Answer: "Yes. I knew what I was doing up until those inspectors came at me. I admit I took that mail in the bathroom."

Question: "What don't you remember?"

Answer: "Opening a letter and taking the money out of it."

Question: "Where was the opened letter?"

Answer: "With the others that I had in my hand and that later was put on the wash basin."

Question: "Where was the money?"

Answer: "They said it was in my shirt pocket; later the inspector had it in the Postmaster's office."

Question: "As I understand it, about all you claim to not have memory for is for the actual alleged act of opening the letter and taking out the money?"

Answer: "Yes, that's it."

Sexual History:

In response to questioning the subject stated that he first had sexual relations at the age of twenty-six after he got married. He claimed that he has never had sexual relations with another girl or woman. He claimed that their sexual relations are satisfactory. He also claimed that he is potent, that is, he is generally able to have a satisfactory erection and achieve an ejaculation. He stated that he

has trouble with ejaculatio praecox and with not being able to have an ejaculation. He said, "I end up with cramps in my lower abdomen." He claimed that they engage in the usual or normal type of sexual relations and he denied oral-genital relations. He also denied ever having had homosexual relations.

Question: "How old were you when you started to masturbate?"

Answer: "I never did that I know of."

Question: "Did you ever have a nocturnal emission or a wet dream?"

Answer: "I never did but once and that was overseas."

This examiner read written material which he believes to be true copies of excerpts from the defendant's Veterans' Administration Hospital record. The examiner also discussed the events of the alleged crime with one of the Postal Inspectors who took this man into custody.

Opinion:

At the time I examined this man he was oriented, quiet, pleasant and cooperative. He answered questions promptly and relevantly. No history of delusions or hallucinations was elicited. He was not pathologically elated or depressed. No evidence of dissociation was noted. He was able to relate substantially the events before and after a portion of the alleged crime. For the portion where he was

sitting on the toilet, he claims that he does not remember.

From my present information there is, in my opinion, no evidence of any psychosis existing in this man at any time. He gives this examiner the impression of being a man of weak character and having a passive, dependent type of personality. However, with my present knowledge of the facts it is my opinion that he is able to presently defend himself and assist his counsel in the preparation and presentation of his defense. In my opinion, he was probably legally sane at the time of the commission of the alleged offense. In my opinion, such a claim of selective amnesia for a portion of the time during which the alleged crime was committed is usually not a valid evidence of a true mental illness existing at that time.

Respectfully submitted,

/s/ EDWIN E. McNIEL, M.D.

[Endorsed]: Filed February 19, 1959.

In the United States District Court, Southern
District of California, Central Division

No. 26930—Criminal

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DONALD W. FORMHALS,

Defendant.

Honorable William M. Byrne, Judge Presiding.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California
Tuesday, February 17, 1959

Appearances:

For the Plaintiff:

LAUGHLIN E. WATERS,

United States Attorney; by

WILLIAM B. OSBORNE,

Assistant United States Attorney.

For the Defendant:

HARRY L. HUPP, ESQ.

* * *

NORMAN H. WILSON

called as a witness by and on behalf of the government, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Osborne:

Q. Mr. Wilson, what is your occupation?

A. Postmaster, Hemet.

Q. For how long have you been engaged in that occupation?

A. In the postal service approximately 32 years.

Q. How long have you been engaged as a postmaster? A. Three years.

Q. Do you know the defendant in this action?

A. I do. [6*]

Q. How long have you known the defendant?

Mr. Hupp: Excuse me for interrupting, Mr. Osborne.

Mr. Wilson, will you keep your voice up, please, so I may hear you?

The Witness: Yes.

What was that last question?

Q. (By Mr. Osborne): For how long have you known the defendant in this action?

A. Since his employment in the Hemet post office, which was June 1, 1954.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Norman H. Wilson.)

Q. Now, what was the nature of Mr. Formhal's duties in the post office?

A. As a postal clerk he was engaged in sorting mail, dispatching mail; sorting and dispatching mail.

Q. What were his duties on the 25th of June?

A. Dispatching outgoing mail.

Q. Did you have occasion to observe the defendant on the 25th of June? A. I did.

Q. Will you explain what you saw? First of all, prior to 4:30?

A. I observed my employee at his stated duties.

Q. When did you next see the defendant?

A. I saw the defendant immediately after lunch.

Q. What time was that? [7]

A. That would be 12:45.

Q. Did you make any specific assignment of work that afternoon? A. I did.

Q. What was that?

A. Dispatching the mail.

Q. Will you explain what dispatching the mail is?

A. Dispatching the mail is that this clerk works at a case with a number of pigeon holes and he dispatches the individual letters to various towns, states, cities.

Q. How does he manually perform this?

A. Can I stand up and show them?

Q. You certainly may.

A. For instance, if this is a case right here, it is full of pigeon holes, the letters are cancelled by

(Testimony of Norman H. Wilson.)

a cancelling machine and they are all put in a rather long, lengthy bunch of letters; the employee picks up a handful of letters, and taking each individual letter, dispatches them to the various pigeon holes. The case has approximately 100 and some separations.

Q. What was the source of these letters which would be before him, how had they arrived?

A. The letters before him could have come out of our main letter drop or been brought in by numerous collection boxes throughout the city of Hemet. [8]

* * *

Cross-Examination

By Mr. Hupp:

Q. Mr. Wilson, are you aware and were you aware—perhaps I should say were you aware at about the time this alleged [24] offense took place whether or not Mr. Formhals had a health problem?

A. Well, will you explain that a little fuller, please?

Q. Did Mr. Formhals ever discuss his health problems with you?

Mr. Osborne: Your Honor, I am going to object to the introduction of this type question at this time. There is no issue as to the defendant's health.

The Court: Overruled. I assume it is a preliminary question.

The Witness: I would state that his health on this day in particular was no different—

(Testimony of Norman H. Wilson.)

Mr. Hupp: Please, Mr. Wilson.

Let me have the reporter read the question and see if you can answer that question.

(The question referred to was read by the reporter, as follows:

("Q. Did Mr. Formhals ever discuss his health problems with you?")

The Witness: Not with me personally, no.

Q. (By Mr. Hupp): Did he ever ask you for time off from work to see the doctor?

A. Yes.

Q. Did you inquire as to what the problem was?

A. Yes. [25]

Q. What was the problem?

A. I think he had a tendency towards stomach trouble. Stomach trouble.

Q. As a matter of fact, he told you he had ulcers, didn't he?

A. I could have been apprised that they were ulcers.

Q. As a matter of fact, you and he discussed this, did you not, because you had ulcers, too, at least you discussed this problem because you had similar problems, is that not so?

A. I don't recall those exact conversations.

Q. On the date of this alleged offense, Mr. Wilson, had Mr. Formhals discussed his physical state with you at all?

The Court: Counsel, I overruled the objection because I assumed that it was a preliminary ques-

(Testimony of Norman H. Wilson.)

tion. But if it is just a condition whether he had ulcers, or the condition of his ulcers, I don't see the relevancy of the question.

Mr. Hupp: May it please the Court, Mr. Formhals' physical and mental state at the time of the alleged offense is the gist of the defense. It will be the defense contention that Mr. Formhals was not in the mental state to have the intent necessary to commit the alleged crime.

The Court: Do you mean that he was worrying about his ulcers? [26]

Mr. Hupp: Considerably more than that. We will have a doctor here this afternoon to set forth the problems in some detail.

The Court: Let's not go into that. You may proceed with your examination. [27]

* * *

WILLARD W. LYNCH

called as a witness by and on behalf of the government, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Osborne:

Q. Mr. Lynch, what is your occupation?

A. Postal Inspector, Post Office Department.

Q. Where is your office?

A. My office is in Los Angeles, this building.

(Testimony of Willard W. Lynch.)

Q. How long have you been engaged in this occupation?

A. I have been a postal inspector about 11 years and in the postal service about 22 years.

Q. Directing your attention to the 25th of June last year, do you recall where you were at that time? A. I was at Hemet, California.

Q. What was the nature of your business there? [29]

A. I was investigating the reported losses of patrons of that city wherein there were complaints of first-class letter mail containing cash. We had as many as eight or 10 such losses, actual complaints, over a period of a few months prior thereto.

Mr. Hupp: May the latter statements after the witness said he was in Hemet, California, to this date go out as hearsay?

The Court: Denied.

Mr. Hupp: May it please the Court, what I am getting at of course is the inspector obviously is relying on other information as to these losses, and he is not testifying from his own personal knowledge.

The Court: He is testifying as to what he was doing. He testified that he was out there inspecting for the purpose of investigating the losses that had occurred prior to this time.

Q. (By Mr. Osborne): Mr. Lynch, do you have a standard procedure or system by which you go about investigating these losses?

(Testimony of Willard W. Lynch.)

A. Yes, sir.

Q. Tell us what it is.

A. The complaints of postal patrons are closely observed and analyzed on a continuing basis for all post offices, and I am charged with specifically this type of work [30] in several counties, including Riverside County, in which Hemet is located, and for that reason, and only that reason, I was in Hemet, California.

Q. Will you explain to us what these procedures are after you arrive at the station which is involved?

A. There is an analysis of the complaints with a view to determining some type pattern. Also with a view to determining the responsibility, the personnel, if it is happening within our postal service, and any and all possible steps, with a view to getting the answer and discontinuing these depredations on the mails.

Q. Specifically, what steps do you take in order to pin down the source of these complaints?

A. Once a suspect is developed, a suspect or suspects would be developed, then there is certainly no direct approach, but there is an undercover testing approach.

Q. Will you explain that, please?

A. And we test the suspects.

Q. Will you explain that testing?

A. Yes. Test letters are used only by our service. They appear like any other type letter. They are prepared in accordance with the type mail which

(Testimony of Willard W. Lynch.)

is being lost, and they are placed in postal channels so as to reach the desired person in an unsuspecting manner. If it is a clerk within the postal service, there are different ways in which the [31] test letter may reach his access. If it is a carrier, it reaches his access on the street, usually.

Q. Now, on the 25th of June did you have occasion to prepare these test letters?

A. Yes, two such letters were prepared.

Q. Did you make a notation as to the mailing of those letters?

A. Yes, sir. All particulars of the two test letters were pre-described prior to placing them in the mails for access.

Mr. Osborne: Your Honor, may this be marked Government's Exhibits 3-A and -B for identification?

The Clerk: Government's Exhibits 3-A and 3-B marked for identification.

(The exhibits referred to were marked Government's Exhibits 3-A and 3-B for identification.)

Mr. Osborne: I submit Government's Exhibits 3-A and 3-B to counsel for his inspection.

Q. Mr. Lynch, I show you Government's exhibits for identification 3-A and 3-B and ask you if you recognize those documents.

A. Yes. This is our regular form on which there is a pre-description.

Q. Does your signature appear thereon?

(Testimony of Willard W. Lynch.)

A. Yes, it does. [32]

Q. What are these documents? A. Sir?

Q. What are these documents?

A. These documents are descriptions of each test letter. There are two in question.

Q. In connection with these two, I show you Government's Exhibits 2-A through -F and ask you if you recognize these letters.

A. Yes, this is a test letter and this was a test letter——

The Court: You say "this is a test letter"; will you identify that?

The Witness: Yes. I prepared that.

Q. (By Mr. Osborne): What exhibit is that you are referring to? A. This is Exhibit 2-A.

Q. 2-A? A. Yes, sir.

Q. Does that refer to—which memo?

A. That refers to this one, sir (indicating).

Q. 3-B? A. 2-A and 3-B, yes.

Q. Very well. Now go ahead.

A. This is the other description of the other test letter, which test letter is in pieces, in which two currency [33] notes—it was my money, and still my money, and which were placed in this letter prior to any testing or any access. As I say, we always use our own money, and it is still my money.

The Court: You are referring to exhibit number what?

The Witness: 2-F.

Mr. Hupp: The defendant will stipulate he may get his money back at the end of the trial.

(Testimony of Willard W. Lynch.)

The Witness: I will get it back.

It is related to 2-A.

Q. (By Mr. Osborne): Did you prepare these letters yourself?

A. Yes, in company with Inspector Dow.

Q. What steps did you take after that?

A. At 3:30 p.m., 6/25/58, this letter——

Q. Which one is that?

A. This is the one which is in pieces.

(Continuing): ——was deposited by me in the lobby drop of the Hemet post office at 3:30 p.m. intact. This letter was deposited at 3:40 p.m., 10 minutes later, in the outside courtesy box in front of the Hemet post office.

Q. In regards to the other exhibits which are there before you, can you explain those?

A. I had nothing to do with those letters, and I never saw those letters prior to their recovery from Mr. [34] Formhals. These are actual bona fide letters mailed by patrons of Hemet. There are four of them. I have since had correspondence with these people, and I have letters to the effect—as to their mailing.

Q. After you had deposited these letters in the mail drops, what did you then do?

A. We then entered the observation gallery from the rear of the Hemet post office building, which is off the rear platform, and proceeded immediately after 3:40 p.m., proceeded to observe Mr. Formhals specifically.

(Testimony of Willard W. Lynch.)

Q. Will you explain what this observation gallery is and where it is located?

A. The observation gallery in a post office is a channel, it is just that, it is a gallery, look-out, a hallway from which postal inspectors may observe the operations without their presence known to anyone in the post office, and there are louvers or small windows from which this observation is made.

Q. Where was this observation gallery in relation to the men's room?

A. In the Hemet office the observation is directly over the one side. It is an L-effect, like this (indicating), and as you enter the look-out, this is a hallway, the men's room is right here at the very rear of the building (indicating). [35]

Q. From that, your position in the observation room, were you able to hear the noises in the men's room?

A. Yes. One may even see from two different louvers certain points in the men's room.

Q. Before we go on, approximately what time was it when you went into the observation gallery?

A. A minute or so after 3:40 p.m.

Q. For how long a time did you remain there?

A. Until 4:30, half past 4:00.

Q. During that period of time what did you observe?

The Court: This is a good time to recess.

During the recess period keep in mind the admonition heretofore given. Do not discuss the case

(Testimony of Willard W. Lynch.)

or form an opinion until the case is finally submitted to you.

We will recess until 2:00 p.m.

(An adjournment was taken at 12:00 o'clock noon to 2:00 o'clock p.m.) [36]

* * *

Direct Examination
(Resumed)

By Mr. Osborne:

Q. Mr. Lynch, when we broke for lunch, [44] I believe you were at a point in your testimony where you were in this observation gallery, and I believe I had just asked you the question, what did you observe?

A. We entered the observation gallery at the rear of the Hemet post office about 3:40 p.m., after the two letters in question had been deposited at 3:30 and 3:40. It was about 4:15 when I saw Mr. Formhals while working at this out-going letter distribution case place a letter, one letter, into his right side pocket. I saw that from the louver of the look-out gallery. The two of us between us had binoculars, and while one would be using the binoculars, the other one had to use his normal vision. That was about 4:15. About 4:30—do you want me to go on?

Q. Please do.

A. About 4:30 p.m. Mr. Formhals entered, left the outgoing letter distribution case on the work-

(Testimony of Willard W. Lynch.)

room floor and entered the toilet room, the men's toilet room at the rear of the post office. We are still in this—I and the other postal inspector are still observing him. We observed his entry into the men's toilet room. We momentarily later heard the tearing of paper, and I would say within the minute from the time he left the workroom and entered this toilet room the two of us leave this look-out gallery and enter the toilet room, and immediately before us, as close as the two of us, was Mr. Formhals seated on a commode. [45] Do you want me to go on?

Q. Yes.

A. We call it a break-out door, it is more than a door, connecting the observation gallery and the toilet room, which permits immediate access into the toilet room, at which point when you step into that door we are as close as the two of us. Mr. Formhals was directly in front of us on this toilet seat, the very rear corner one, and he was immediately approached and asked regarding his operation. It was pointed out that directly under him was this torn letter and——

Mr. Hupp: May it please the Court, I think the witness is again summarizing what Mr. Formhals said. We object to the conclusion as such.

The Court: Overruled. He is describing what he saw.

Mr. Hupp: I am sorry. Then I misunderstood the witness.

(Testimony of Willard W. Lynch.)

Q. (By Mr. Osborne): You said under him. Would you explain that?

A. Yes. This is all within seconds from the time we entered this toilet room, Mr. Formhals is seated on this commode, and we were aware and we could see the currency notes protruding from his left shirt pocket, and directly under him—— [46]

Q. Excuse me. Were those the currency notes which you previously examined as part of Exhibit 2?

A. The exhibit consisting of the currency notes. And directly under him was the torn letter in pieces, which he was—this is all within moments—he was requested by us to recover himself.

Q. Did he recover them?

A. He did recover piece for piece.

Q. Are those the pieces which——

A. Those are the pieces.

Q. That is in Government's Exhibit 2-F?

A. Yes. Those are the same pieces representing the letter in which the same two currency notes in his pocket had been included at the time we had mailed it, I had mailed it, one hour earlier, at 3:30 out on the street.

Q. Was that one of the two test letters that you deposited?

A. Yes, sir. Also at the same time were these five other letters, four of which are not tests but are bona fide letters mailed by patrons of the Hemet office, at least four other letters and one other test, were on his bare leg between his trousers

(Testimony of Willard W. Lynch.)

and his bare leg on the left leg as he was seated on this commode.

Q. What did you state to Mr. Formhals at this time?

A. He was immediately asked, before he would have [47] the opportunity—before there would be any opportunity of disposing of these torn particles in the commode, to recover them. Which he immediately did. He co-operated and he recovered them. He was also asked to recover the two \$1.00 currency notes from his left pocket, which he did. We did not go onto his person at any time, and we didn't go into the commode. He did those two acts himself at our request.

Q. What happened then?

A. It is all within a minute or so there. He was asked to hand us the five letters from his bare left leg and to get up and put his pants up and accompany us to the postmaster's office. I would say one to two minutes at the most transpired in this toilet room.

Q. Did you then proceed to the office of the postmaster?

A. To the postmaster's office, to the front of the building. We even asked him—I remember specifically asking him, to save him any embarrassment, if he would like to accompany us on the exterior of the building around through the lobby.

Q. Was this done?

A. However, it was decided—we just went on through the work room into the postmaster's office.

(Testimony of Willard W. Lynch.)

Q. What happened when you arrived at the postmaster's [48] office?

A. The postmaster was immediately apprised of the facts.

Q. That is Mr. Wilson?

A. And Mr. Formhals was asked to be seated, and the mail was shown to him and he was asked to place his name and date as identification of the letters which were recovered from his person and the toilet commode.

Q. Did the defendant do this at this time?

A. He did it immediately.

Q. What happened after that?

A. This was about 4:30, 4:32 in the postmaster's office. By 5:50 or an hour and 20 minutes, the defendant had been completely interrogated, asked as to his offenses, his prior offenses, and all this information was incorporated in a statement which was completed at 5:50.

Q. How did you go about obtaining information from the defendant?

A. I typed this statement.

Q. First, let me ask, did you make any promises to the defendant?

A. No promises, threats, or inducements. He was also apprised of his constitutional rights in every other respect, however, the fact that any other information could be used against him in a court or otherwise. [49]

Q. How did you proceed about obtaining this information from him? By question and answer?

A. Yes. As the various statements are placed in

(Testimony of Willard W. Lynch.)

writing within this typewriter, he would be asked sentence for sentence, before it would be placed in writing. The statement was gradually built, you might say, sentence for sentence, paragraph for paragraph, each sentence being placed after he confirmed the statement.

Q. What did the defendant say at that time in regards to the reason that he had the letters with him in the commode?

A. He admitted the theft of those six letters and the rifling of the one letter. He also said——

Mr. Hupp: I will object to that as a conclusion.

The Court: Sustained. Tell us what he said.

The Witness: "I took the six letters, and I have opened the one, and I also threw the particles into the toilet commode." He said those things.

Q. (By Mr. Osborne): Did he tell you why he had done this?

A. He admitted these acts.

Mr. Hupp: Again I will object.

The Court: That may go out as a conclusion.

Mr. Osborne: Very well, your Honor.

The Court: You tell us what he said, and the [50] jury will determine whether he admitted these acts.

The Witness: All right, sir.

Q. (By Mr. Osborne): What did he say with regards to why he had done this?

A. He stated that he had taken these letters from the time—that afternoon, from the time he had started work on the outgoing distribution case at 2:45 until 4:30, a matter of an hour and 45

(Testimony of Willard W. Lynch.)

minutes. He also said that he took those particular letters because they were going to different charitable organizations in this country, for which he thought—and this is true on his part—for which he thought there is no real follow-up, that these charity houses don't know from whom they are receiving the contributions. And he made that statement that that was the reason for his selection of this type mail, this type of letter.

Q. Did he explain why he had torn up the one letter?

A. Yes. He said he had just—that was the first one, and he intended to tear up each one in turn while still seated on that commode, on the one act.

Q. You are now referring to the six letters?

A. That is right. However, we entered at the time and it was a 1 to 5 ratio. If we had waited longer, this is an assumption——

Mr. Hupp: I will object to the conclusion. [51]

The Court: You have answered the question.

Q. (By Mr. Osborne): Did he explain how he had the two \$1.00 bills in his pocket, did he explain to you how he had those in his pocket?

A. Yes. He stated he had just removed the two \$1.00 bills from this letter, and he had just destroyed or torn up the envelopes in which it had been contained. Which act we heard.

Q. Did the defendant make any statements to you regarding any prior activities regarding depositions of mail?

A. Yes. He said that he had been committing

(Testimony of Willard W. Lynch.)

depredations on the mails while working at this out-going distribution case, only that type mail, no incoming mail for delivery in Hemet, while working on this outgoing distribution case, for approximately six months prior to that date, June 25th, from which he had derived about \$50, not counting the acts of that day. He also said that—I have already said that he told us the reason for his selection of charitable letters. He said that in some instances he had opened letters which contained money orders or checks, and which he had resealed, inasmuch as there wasn't any currency to be derived, and he wished the addressees to receive the checks or money orders.

Q. You say you were typing these statements as they [52] were made. I show you Government's Exhibit for identification No. 1 and ask you if you recognize this document.

A. Yes, sir, I typed this. This is my signature.

Q. Is that the document you referred to earlier in your testimony?

A. This is the affidavit, yes, sir.

Q. How do you so recognize it?

A. I recognize it, it is on the United States Post Office letter form which was taken from the postmaster's desk at Hemet; it bears my initials and date on the first page; it bears my name on the second page, and it shows the time that it was executed as 5:50 p.m.

Q. Is there any handwriting of the defendant on that?

(Testimony of Willard W. Lynch.)

A. Yes. There is the handwriting of Donald W. Formhals, 5:50 p.m., June 25, 1958, on page 1, at the bottom; Donald W. Formhals' signature on page 2; and also in his handwriting, this—"I have read my statement of two pages and I say that everything herein is the truth." In addition there is the signature of C. W. Dow, a postal inspector. And on the front, page 1, "C.W.D. 6/25/58."

Q. Was this writing placed on that paper in your presence?

A. Yes, sir, as of 5:50 p.m.

Q. Does this typewritten report contain matter to [53] the same effect as you just testified?

A. Sir?

Q. Does that statement contain information to the same effect as you have just testified?

A. Yes, sir.

Mr. Osborne: I would like to offer Government's Exhibit for identification No. 1 into evidence at this time.

The Court: It will be received.

(The exhibit referred to was received in evidence and marked as Government's Exhibit No. 1.)

Q. (By Mr. Osborne): Mr. Lynch, I show you Government's Exhibits 3-A and 3-B for identification, and ask you whether you recognize these documents? A. Yes, sir.

Q. Will you tell us what the documents are?

(Testimony of Willard W. Lynch.)

A. These two, 3-A and 3-B, are descriptions of the two representative test letters showing a description of the exterior of the letters and a description of the monetary content of the letters.

Q. How do you recognize those?

A. It bears my signature.

Q. Your signature appears on both of them?

A. Yes, sir.

Mr. Osborne: Your Honor, I would like at this [54] time to offer Government's Exhibits 3-A and -B into evidence.

The Court: They will be received.

(The exhibits referred to were received in evidence as Government's Exhibits 3-A and 3-B.)

Q. (By Mr. Osborne): During the time you had Mr. Formhals under observation, did you notice anything unusual about his physical condition?

A. Nothing whatsoever. He was under observation from 3:40 to 4:30, 50 minutes, and thereafter later of course incident to the approach.

Q. In other words, your statement is you had him under observation almost continuously from 3:30 until what time?

A. From 3:40 until 4:30 from the look-out gallery, and from 4:30 until 5:50 thereafter.

Q. And during the time that you were questioning the defendant did he appear unduly nervous?

A. I observed no undue emotion of any kind.

Mr. Osborne: I have no other questions of this witness.

Mr. Hupp: No questions. [55]

* * *

DR. GLEN HALVERSON

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated, sir, and give us your full name.

The Witness: Glen R. Halverson.

The Clerk: H-a-l-v-e-r-s-o-n?

The Witness: Yes.

Direct Examination

By Mr. Hupp:

Q. Dr. Halverson, what is your profession?

A. I am a physician and surgeon.

Q. Are you a medical doctor? A. Yes.

Q. Will you describe briefly your training, please?

A. I graduated for medicine from the College of Medical Evangelists in 1934, and after serving a year of residency, have engaged in the general practice of medicine and surgery. [58]

Q. Where are you presently practicing?

A. I am presently practicing and have been for some 21 years in San Jacinto.

Q. Is that near Hemet, California?

(Testimony of Dr. Glen Halverson.)

A. That's right.

Q. Dr. Halverson, in your practice of medicine, have you had occasion to treat the defendant Donald Formhals?

A. I saw him first in January of 1955.

Q. Have you treated him off and on ever since?

A. On several occasions.

Q. Doctor, did you have occasion to treat Mr. Formhals for a condition known as a duodenal ulcer?

A. Yes.

Q. Will you state when you first treated Mr. Formhals for that condition?

A. In January, 1955, I first saw him for that condition. I recommended adequate examination to establish the diagnosis, and this was done in the Veterans Hospital shortly thereafter.

Q. Was the diagnosis confirmed?

A. Yes.

Q. Has Mr. Formhals been suffering from a duodenal ulcer ever since?

A. I believe he has, yes.

Q. Do you know whether he was treated at the Veterans [59] Hospital starting September of this last year and through December for the same condition?

A. I understand that is the case.

Q. Doctor, will you explain to the jury—

Mr. Osborne: May I object to that last question, your Honor? Not that I contest the validity of it; however I would prefer the witness to testify to matters with which he is familiar, rather than unsupported hearsay.

The Witness: The only thing I can say about

(Testimony of Dr. Glen Halverson.)

that is that the patient when I saw him in November, that he had been in the Veterans Hospital from September to the early part of October.

The Court: Did he answer that satisfactorily? I didn't hear what you said.

Mr. Osborne: I was just objecting on the grounds that it is hearsay; not that I contest the validity. I offered to stipulate to the condition and the hospitalization of the defendant.

Mr. Hupp: Which is a stipulation that I will accept here in due course when we can present it in a little more detail.

Q. (By Mr. Hupp): Very well, Doctor. During the course of a duodenal ulcer, is it common for a patient to have heavy bleeding through the intestinal tract? A. Relatively so, yes. [60]

Q. Is it also common for this condition to cause a diarrhea condition?

A. Diarrhea frequently accompanies such.

Q. Do you know whether Mr. Formhals had suffered attacks of this nature, diarrhea accompanied by heavy bleeding from the intestinal tract, during the course of your treatment of him for this ulcer?

A. Such had been the case. He came in on several occasions, indicating that he had had black stools, which is the result of bleeding in the intestinal tract.

Q. Are these sometimes called tarry stools?

A. That is correct.

Q. What do these stools look like?

(Testimony of Dr. Glen Halverson.)

A. They are black, sticky.

Q. What causes them to be that color?

A. The change which occurs in the intestines due to the blood which has been released into the intestines from, in this case the ulcer.

Q. In other words, there is large quantities of blood mixed in with the stool, which causes it to be that color?

A. That is right.

Q. Doctor, Mr. Formhals, you say, had this symptom, had this problem. Can you tell me when you observed it first? When did you first treat him for it? [61]

A. First in January, 1955; he had a recurrent attack in May of that same year, and another attack in September, which carried on into October, 1955.

Q. Do these attacks come and go at different intervals, staying sometimes for a period of a week or two, and other times coming and going rather rapidly?

A. Yes.

Q. Doctor, what is the effect or what can be the effect on the person's mental state, assuming that there is prolonged diarrhea and heavy bleeding, heavy, tarry stools through the intestine?

Mr. Osborne: Your Honor, I am going to object to the form of the question.

The Court: Wait until he finishes the question. Had you finished?

Mr. Hupp: I think I had.

Mr. Osborne: I object to the form of the ques-

(Testimony of Dr. Glen Halverson.)

tion. It is leading the witness and it doesn't seem to be in the form of a hypothetical question. I am not sure that I understand exactly what type of question it is.

The Court: The objection is sustained. It is speculative. He asked what can be.

Mr. Hupp: Very well. Let me put it this way, if I might.

Q. Doctor, assume that Mr. Formhals had heavy bleeding [62] through the intestinal tract, and this was prolonged over a week or two, and along with this he had recurrent attacks of diarrhea maybe, three, four, five times a day, that he had to go to the toilet, could this condition affect his mental state? A. Yes.

Q. What effect would it have?

A. When there is considerable loss of body fluids, electrolytes and blood, an individual may become—the end result of that is coma.

Q. Is that sometimes called unconsciousness?

A. That's right.

Q. Can there be intermediate stages?

A. There may be intermediate states at all levels until the state of coma may be reached.

Q. Suppose we had a person who was not unconscious, but who had been suffering these attacks, what would be their mental state?

A. They might act reasonably normal, but at a later date be unable to recall or remember any actions that they did, or any events that transpired during this time.

(Testimony of Dr. Glen Halverson.)

Q. Is it possible that they could act somewhat—be acting somewhat in a daze without really knowing what they are doing? A. Yes. [63]

Q. Dr. Halverson, do you recall any occasions on which you saw Mr. Formhals in which he appeared to you to be in a daze?

A. This occasion in October of 1955, when he had a rather prolonged spell, he appeared to act just a little bit as if he were in a daze at that time.

Q. What were his actions that you recall that led you to that conclusion?

A. This is purely a memory—relying on memory at this time, there is no record of it in my records, written records, but I do recall that at that time he seemed to be a little confused and did not comprehend what was going on.

Mr. Hupp: Thank you, Doctor. You may cross-examine, Mr. Osborne.

Mr. Osborne: Your Honor, may I ask for a brief recess? Some of these terms are unfamiliar and I would like the opportunity to talk to Dr. McNiel a moment, if I could.

The Court: All right. We will take the afternoon recess.

During the recess period keep in mind the admonition heretofore given. Do not discuss the case. We will recess for about 10 minutes.

(Recess taken.)

The Court: May it be stipulated that all the members of the jury are present?

(Testimony of Dr. Glen Halverson.)

Mr. Hupp: So stipulated, your Honor. [64]

Mr. Osborne: So stipulated, your Honor.

Cross-Examination

By Mr. Osborne:

Q. Dr. Halverson, first let me make sure that I have your hypothetical situation correct. Is it correct that you stated that a man in Mr. Formhal's condition, with this ulcer condition, could through loss of blood be in such a condition between consciousness and unconsciousness so as not to remember his acts?

A. There would be one thing to add there before I answer, and that is loss of blood and water and electrolytes. That so upsets the body economy that individuals seem to be reasonably normal, but actually they do not recall what goes on. There is that state between consciousness and unconsciousness, yes.

Q. Assuming that state of facts, is it correct to say that you characterize this as somewhere between the state of total consciousness and the state of total unconsciousness? A. Yes.

Q. Am I correct in assuming that you are not characterizing this as amnesia, you are characterizing this, rather, as a loss of memory?

A. This is the result of a physical condition and [65] not the result of a mental condition.

Q. Doctor, I would like to ask you to draw a distinction between the situation of loss of memory

(Testimony of Dr. Glen Halverson.)

and a situation which is characterized as amnesia.

A. I am not a psychiatrist, nor a neurologist, but as I understand it, amnesia is a condition that is purely a mental condition, and the person may be perfectly normal physically. The condition I am speaking about is the abnormal mental functions in the presence of a depleted condition with reference to blood and water and electrolytes, which are lost in the process of bleeding and diarrhea.

Q. Is it true that you are saying this results in a loss of memory? A. Yes.

Q. A person, however, subject to this condition is conscious of what he is doing at the time, is that not true? A. I would think so, yes.

Q. In other words, when he does an act, he knows what that act is, although—let me rephrase that question. He does know what he is doing, is that true?

A. I think there may be some question about that. That he may realize, and he may not realize.

Q. Will you explain that, please? [66]

A. We see individuals in the hospital who have suffered a situation of this kind and they have acted as if they were reasonably normal, and after they have been given adequate treatment they fail to remember anything they did during—it may be several days—during the time that the body economy was so disturbed, that they do not remember anything that they did, or the time that has elapsed.

Q. Now, in your own words, would you draw a distinction between a loss of memory and the situa-

(Testimony of Dr. Glen Halverson.)

tion where you don't know what you are doing, or is there a distinction?

A. I don't believe I would be able to answer that very well. I think that borders on the psychiatric angles and I wouldn't attempt an answer.

Q. Let me ask you this question: If a man is subject to this condition you are talking about, where he has had a loss of body fluids, is it not true that his physical capabilities are also somewhat impaired?

A. In some instances they don't seem to be. The end result——

Q. Is it not normal that his physical abilities would be impaired?

A. The end result is unconsciousness and complete impairment of physical abilities, yes. But—— [67]

Q. As a general rule, isn't this true, that as a person would reach a state serious enough to impair his mental facilities, that also his physical capabilities would be somewhat impaired?

A. In those that I have seen, they seem to act perfectly normal both in their mental and physical activities, and then when the fluids and electrolytes are corrected, then they are cognizant of things as they are actually, and have complete loss—have no memory at all for what has occurred in the preceding time.

Q. Is it true that you are stating that the man, although he may have future loss of memory, that he is in all probability thinking clearly and acting

(Testimony of Dr. Glen Halverson.)

normally? That seems to be what you are saying. Is that true?

A. I doubt if he is thinking clearly. He may be acting apparently normally.

Q. What would you describe as the condition of his thinking during a state such as we are discussing?

A. Frankly, I don't know what to think about that. All I know is that patients in that condition do not recognize what is going on about them, and they do not have recollections of seemingly normal activity that they engaged in during the time.

Q. Would it be possible in this condition for a person to engage in acts requiring a certain amount of complicated [68] thinking?

A. I don't know.

Q. Doctor, wouldn't it also be true that if a person had lost the amount of blood required to bring on this condition, that there would be some manifestations possibly in that the loss of blood would cause him to be somewhat pale and there would be other characteristics such as perspiration, excess perspiration, some outward manifestations of his condition?

A. No. Of course, you would have to qualify that by saying a loss of blood and electrolytes, because it is the electrolytes loss, the fluids and salts, that are the factor which primarily causes the mental disturbance.

Q. That is the situation that I am discussing.

(Testimony of Dr. Glen Halverson.)

You will have to forgive my lack of familiarity with the terms.

A. It would be both factors.

Q. Now, if both those factors were present, isn't it true that the person suffering this affliction would exhibit certain characteristics, such as paleness, excessive perspiration, and other outward manifestations?

A. When the severity of the situation is sufficient, that will be true. But I think the disturbance of the mental faculties may occur before the appearance of these signs of shock would come, sweating and paleness and [69] so forth.

Q. When a person has reached this particular degree of this situation, in the usual situation would it be possible that he could return again to normalcy, or would he ordinarily progress on into a more severe form of shock?

A. Depending on the continuance of symptoms, as to whether or not he would get better or worse.

Q. Did you examine the defendant on or about June 25, 1958? A. No.

Q. Did you examine the defendant at any time within two or three weeks before or after that date?

A. No.

Mr. Osborne: I have no further questions.

(Testimony of Dr. Glen Halverson.)

Redirect Examination

By Mr. Hupp:

Q. Just one or two very brief questions, Dr. Halverson.

You have described this condition as occurring with a loss of body fluids, electrolytes, and blood. What physically happens to the brain?

A. The functions of the brain become impaired when there is deficiency of salt and water. As a short illustration, in very small infants who have a severe attack of [70] diarrhea, they become unconscious in a matter of hours. In an adult the situation takes a longer time, and depending on how severe the symptoms may be.

Q. Does this condition result in a lack of supply of oxygen to the brain?

A. I am not aware of the answer to that question with reference to electrolytes and the functioning of the brain, and the lack of electrolytes and fluids.

Q. As a rough illustration, Doctor, when a person is suffering from this condition, is he roughly like an aged person suffering from arteriosclerosis with regard to his memory and the connection between his physical and mental acts?

Mr. Osborne: Your Honor, I object to that question as being completely conjectural.

The Court: Overruled.

The Witness: Only that the actions of the in-

(Testimony of Dr. Glen Halverson.)

dividual who is suffering with arteriosclerosis, and his brain does not function for that reason, only on his surface activities he would appear all right; and that would be the only way that there would be any comparable condition is that the individual suffering with a deficiency of electrolytes and fluids might appear to act normal, but actually they are not.

Mr. Hupp: Thank you, Doctor. That is all I [71] have.

* * *

DR. EDWIN E. McNIEL

called as a witness in rebuttal by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated, sir, and give us your full name.

The Witness: Dr. Edwin E. McNiel.

Direct Examination

By Mr. Osborne:

Q. Dr. McNiel, what is your occupation?

A. Physician and surgeon, M.D.

Q. Do you have a specialty?

A. Yes, I do.

Q. What is that?

A. Neurology and psychiatry.

Q. Will you state briefly what your training and experience [72] has been?

(Testimony of Dr. Edwin E. McNiel.)

A. I graduated from the University of Colorado School of Medicine in Denver in 1931. Following that I served a rotating internship in the Alameda County Hospitals in Oakland and San Leandro. After that I was a Commonwealth Fund Fellow in Psychiatry at the University of Colorado Medical School for two years. After that I was a resident psychiatrist at what was then called Bloomingdale Hospital in White Plains, New York, for two years. After that I was clinic executive at the Paine-Whitney Psychiatric Clinic which is associated with the New York Hospital, Cornell Medical School, New York City, for a little over two years. After that I was Director of the Hawaii Mental Health Clinic in Honolulu for nine months, and then I was Director of the Bureau of Mental Hygiene for the Territory of Hawaii for a little over four years. The last 15 years I have been in private practice in neurology and psychiatry here in Los Angeles. I am certified by the American Board of Psychiatry and Neurology—

Mr. Hupp: Doctor, excuse me for interrupting.

If it will save time, we will stipulate to the doctor's qualifications.

Q. (By Mr. Osborne): Would you complete your answer, please?

A. I have been on the panel of the Superior Courts—psychiatric [73] panel of the Superior Courts of Los Angeles for approximately 15 years, and on the panel of the Federal Courts in Los Angeles for approximately 15 years. Psychiatric consultant to the juvenile courts in Los Angeles for

(Testimony of Dr. Edwin E. McNiel.)

about the same length of time. I am a member of the Los Angeles Society of Neurology and Psychiatry, the Southern California District Branch of the American Psychiatric Association. I am a Fellow of the American Psychiatric Association, a member of the American Orthopsychiatric Association, a member of the American Psychopathic Association, and several others. I think that is probably enough.

Q. Doctor, are you familiar with the defendant in this action?

A. I examined him on one occasion.

Q. Was that as a result of being appointed by this Court to examine the defendant?

A. Yes, it was a Court appointment.

Q. Doctor, you have been present while Dr. Halverson was speaking; are you familiar with the medical aspects of the symptoms brought on by bleeding ulcers?

A. I believe so.

Q. If I may pose a hypothetical question in which I may attempt to approximate that which was posed to Dr. Halverson. That is, assume a situation where a person has this condition of bleeding ulcers, accompanied by so-called [74] tarry stools, over a period of time, of course accompanied with a loss of blood and a loss of certain body fluids; now, in that situation would you describe what is generally the physical result of such condition?

A. Well, in my opinion this is entirely dependent upon the amount of blood that has been lost in a given period of time. There are of course millions of people in the country who have ulcers which

(Testimony of Dr. Edwin E. McNiel.)

occasionally bleed, and most of them are walking around and doing their normal work.

There are people, however, who may have a substantial loss of blood within a relatively short period of time, and there of course this naturally can proceed to the point where there is unconsciousness.

Q. Doctor, at this point I would like to ask you to distinguish between unconsciousness and amnesia, if you would.

A. Well, amnesia refers to a loss of memory for a particular event or series of events. Amnesia may be of three types. It can be a claimed loss, which may be malingering, or in other words the individual says he does not remember when in fact he does; it may be an organic amnesia which is based on some change in the structure or function of the brain; or it may be an hysterical amnesia, in which the individual honestly claims [75] that he doesn't remember, but actually later on he may remember, or he may remember on the use of medication or something of that sort. But it is honest.

Q. Will you distinguish this situation and the situation described as lack of consciousness?

A. Well, I assume that you are referring to the state of consciousness at the time of the commission of the alleged act, is that it?

Q. We are still dealing in terms of a hypothetical, the hypothetical situation being that this loss of blood has occurred——

The Court: Mr. Osborne, I want to interrupt you once more for your own benefit. If you could

(Testimony of Dr. Edwin E. McNiel.)

watch these jurors—you have just the reverse of what we have in the ordinary case. In the ordinary case the attorney speaks out and it is easy for the jurors, and then they have difficulty hearing witnesses. Here these jurors, when you ask a question, they are up like this (indicating), and then they relax, because they can hear clearly the witness testify. If you will just watch the jurors. The witness himself speaks so clearly and they can understand him and they are relaxed. When you are asking a question they are out like this (indicating) trying to catch you, and then I suppose they catch about half of it. [76]

Mr. Osborne: I am sorry. I have a little sore throat, and if I speak too loudly I will end up coughing.

The Court: Speak from your diaphragm. If you can't feel it down here (indicating), and I often tell witnesses that, if you can't feel it down here, you are not speaking loud enough.

Mr. Osborne: Very well.

Q. Doctor, is there a distinction between amnesia and loss of consciousness?

A. Well, in my opinion there is.

Q. What is that distinction?

A. By consciousness in this situation we are referring to the state of mind of the individual at the time of the alleged act; and when we speak of amnesia we are speaking of some state of the individual saying that he does not remember what happened at that time. The fact that he says he does

(Testimony of Dr. Edwin E. McNiel.)

not remember doesn't mean that he wasn't conscious at the time. He may have a complete loss of memory for what happened, but that does not mean that he was unconscious or unaware of the nature of what he was doing at the time of the act.

Q. In your opinion, Dctor, is it possible that a person who is somewhere in this range of loss of consciousness due to loss of blood could commit acts without knowing what he was doing, and this would be as opposed to [77] could commit acts and then suffer a loss of memory? This is the situation that I am trying to distinguish.

A. Well, in my opinion the commission of acts in a state of unconsciousness is an extremely rare situation. There are only a very, very few conditions that in my opinion are responsible for such a situation.

Q. Could you explain what that type of condition would be?

A. There are certain types of epilepsy where this may be true; there are certain types of brain tumor where it may be true; in an extremely acute state of alcoholism it may be true.

Q. These are acts committed without knowing——

A. The patient being conscious and aware of the nature of the acts which he is committing.

Q. Doctor, in this condition due to a loss of blood, is it more likely that the person would have a loss of memory than the loss of reasoning ability?

(Testimony of Dr. Edwin E. McNiel.)

A. Probably.

If I may, your Honor, I think the doctor stated in his cases in the hospital that afterwards when they were treated that they did clear up——

Mr. Hupp: Excuse me, Doctor.

I will object to argument regarding the effect of Dr. Halverson's testimony. I have no objection to Dr. [78] McNiel expressing his own opinion here.

The Court: The objection is overruled. He may explain his answer. He is explaining his answer.

Mr. Osborne: Would you continue, Doctor?

The Witness: Well, I was simply trying to state that the doctor in recounting his own experiences in the hospital, that he had cases where they had this condition and after they treated them that later on they did recover some of their memory for the event.

I believe that is what he said.

Q. (By Mr. Osborne): Doctor, you did state that you have examined this particular defendant, is that true? A. Yes, sir.

Q. And did this defendant relate to you his medical history? A. Yes, sir.

Q. Did you have an opportunity to examine him at length?

Excuse me.

Did you have an opportunity to examine him at length concerning his mental condition at the time of the commission of this offense?

A. Yes, I did.

Q. In your opinion what was his mental condi-

(Testimony of Dr. Edwin E. McNiel.)

tion at the time of the offense? In your opinion, Doctor, [79] what was his mental condition at the time of this offense?

A. In my opinion he was sane and without psychosis and in control of his mental faculties.

Q. Is it possible that he might also have suffered a loss of memory as to what happened at this specific instance, without altering your opinion?

A. Surely.

Q. And this would in no way be inconsistent with your conclusion in the matter?

A. No, sir.

Mr. Osborne: I have no further questions.

Cross-Examination

By Mr. Hupp:

Q. Dr. McNiel, as I understand it, your specialty is psychiatry, you are primarily a psychiatrist; is that correct?

A. Neurology and psychiatry.

Q. As such you normally do not treat ulcer patients, is that also correct?

A. No. As a matter of fact, I see a good many ulcer patients.

Q. But what I am getting at is you normally are treating the mental, or you might say—yes, the mental aspects of what perhaps you might say causes the ulcer, or [80] what results from it, rather than the ulcer itself?

A. It may or may not be that situation, depending on the individual case.

(Testimony of Dr. Edwin E. McNiel.)

Q. Doctor, you said that, as I understand it, the acts of which the patient is not conscious are very rare, and you gave as an example some types of tumor, epilepsy, and alcoholism. In this type of situation does the patient do acts which his mind doesn't command him to do?

A. I am sorry, I don't get your question.

Q. Perhaps I don't get it, either. Maybe what I should say—let me use this example. Take a person who is sleepwalking, obviously he is doing volitional acts, his muscles are moving his acts, but in that situation does the patient know what he is doing?

A. He is in my opinion in a changed state of consciousness.

Q. Would you say that this was a wilful act, sleepwalking?

A. Well, in my opinion it is subject to the desires of the individual.

Q. In other words, in the sense that you use the term consciousness, the physical motions, the moving of the muscles which cause the legs, say, to move forward, or the hand to go in the pocket, all this is a conscious act by the patient as you use the term, is that correct? [81]

A. This is a difficult thing and I want to try to be correct about it.

There is a variation in the state of consciousness, but I believe the accepted theory is that the majority of people would not commit an act in a state of sleepwalking that would be against their ordinary

(Testimony of Dr. Edwin E. McNiel.)

principles. And very often they are able to remember part of it.

Q. That wasn't the question. I don't mean to cut you off, but I wonder if you would direct yourself to the question I asked.

Would you read the question, Mr. Reporter, please?

(The question referred to was read by the reporter, as follows:

“(Q. In other words, in the sense that you use the term consciousness, the physical motions, the moving of the muscles which cause the legs, say, to move forward, or the hand to go in the pocket, all this is a conscious act by the patient as you use the term, is that correct?”)

The Witness: Well, I'm sorry, counsel, I feel I did answer the question. It is in a stage of consciousness. It may not be fully-aware consciousness.

Q. (By Mr. Hupp): Then there are degrees of consciousness running all the way from complete inertness to [82] what you might call fully-aware consciousness? A. Naturally.

Q. In other words, it is not a question of the man is either conscious or unconscious, but there are degrees ranging the full spectrum?

A. We are still in sleepwalking?

Q. If you want to be still there, if that will help illustrate the answer, yes. A. All right.

Q. Maybe we are not clear as to whether I just asked a question or not. Let's skip the sleepwalking

(Testimony of Dr. Edwin E. McNiel.)

for a minute. There are degrees of consciousness ranging all the way from, say, when a man is sleeping or has been conked on the head, to where he is running around playing baseball and fully aware of his every act; is that correct? A. Yes, sir.

Q. And that somebody could be anywhere from one end of the spectrum to the other and still be what you would call fully-aware consciousness or a changed state of consciousness?

A. Depending upon the various factors that are involved in the particular situation, yes, sir.

Q. Right. Now, what effect would a lack of supply of oxygen to the blood stream have on the brain? Is this commonly called anemia? [83]

A. In my opinion it is a secondary effect.

Q. What is anemia?

A. Anemia has to do with having a low content of hemoglobin in the bloodstream. This may mean a low number of red blood cells or it may mean a small—the normal percentage of hemoglobin in the blood cells.

Q. In some situations is there a lessening of the supply of oxygen to the brain?

A. In some situations?

Q. Yes. A. Yes.

Q. Does this cause a similar effect on the brain that would come about, say, to an aged person with an arteriosclerosis and a narrowing of the blood vessels in the brain? In other words, what I am getting at is a lessening of the supply of blood to the brain.

(Testimony of Dr. Edwin E. McNiel.)

A. Well, in the person with an arteriosclerosis, and aging, there is a diminution in the whole circulatory process in the brain, and of course that does result in the individual cells in the brain having a lowered supply of oxygen and other nutrients.

Q. Doctor, you have undoubtedly had patients, have you not, who have this problem of arteriosclerosis and have a lessening of the effect of blood on the brain? You have had patients with arteriosclerosis? [84]

A. Yes.

Q. It is a common thing in aged people, I take it. Isn't it common for such people to be in what you might call a daze, not be fully aware of what they are doing from time to time?

A. They may or may not be, depending upon their condition.

Q. Suppose they are, what is the effect, what happens to their brain?

A. Suppose they are what?

Q. In what you said, sometimes they are in a dazed condition and sometimes they aren't. All right. Now I am taking the half that are.

A. I want to make this clear, counsel; that every person who has arteriosclerosis is not in a dazed condition.

Q. I understand that.

A. It varies depending on what the actual architectural and organic state of their brain is, and depending upon their circulation.

Q. This I understand, Doctor. Let's take the people who have a lessening of the supply of blood

(Testimony of Dr. Edwin E. McNiel.)

to the brain and you say sometimes they are in a dazed condition. What happens to their brain in this situation?

A. Well, it isn't supplied with the normal amount of [85] oxygen, and the waste products are not carried away, and they don't secure the normal nutrient factors for the brain tissue, and there may be a diminution in the function of the brain cells.

The Court: Counsel, this is all very interesting, but may I ask, is it your contention that the defendant had arteriosclerosis?

Mr. Hupp: No. I am using this more as an example to make it clear to the court and the jury what can happen in a diminution of the supply of blood and oxygen to the brain.

The Court: If you do not contend that he was so afflicted, of course it isn't going to be of any help to the jury.

Mr. Hupp: Very well. Let me pin it down this way, Doctor:

Q. Would the medical situation be similar in this instance, in this sense, that where you have a loss of a great deal of blood from a duodenal ulcer, and the patient has developed anemia, could it be that there is a lessening of the supply of blood to the brain?

A. Well, in my opinion, there would probably be the same amount of blood going to the brain.

Q. But would there be a lessening of the supply of oxygen to the brain? [86]

A. There could be.

Mr. Hupp: I have no further questions.

Mr. Osborne: I have no further questions, your Honor.

* * *

DONALD W. FORMHALS

called as a witness by and in his own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated, sir, and give us your full name.

The Witness: Donald W. F-o-r-m-h-a-l-s, Formhals.

The Clerk: Thank you, sir.

Direct Examination

By Mr. Hupp:

Q. Mr. Formhals, you are the defendant in this case? A. Yes, sir.

Q. Were you on or about June 25th last year a postal employee employed at the Hemet post office?

A. Yes, sir, I was.

Q. On that date you were arrested by [87] Inspector Lynch and Inspector Dow and charged with stealing from the mails? A. Yes, sir.

Q. Mr. Formhals, at and a number of years prior to that time what has been your physical condition?

A. Well, in and out of the hospitals about 90 per cent of the time.

Q. Are you suffering from a duodenal ulcer?

(Testimony of Donald W. Formhals.)

A. Yes. And the duodenal ulcer is the main source of my troubles.

Q. Mr. Formhals, have you had at various times and with varying intensities severe diarrhea attacks? A. Yes, sir.

Q. For how long do these attacks last from time to time?

A. Different times I have had them they have varied in length. Sometimes for hours, sometimes I have gone for several days just one trip after another, just practically a constant run back and forth to the bathroom.

Q. On occasions have you also had heavy bleeding through your stool? A. Yes.

Mr. Osborne: I will object to this, your Honor, and ask that the question and answer be stricken. It is leading the witness. [88]

The Court: The objection is not timely. They are leading questions, but the objection is overruled. It is not timely. He has already answered the question.

Mr. Osborne: Very well, your Honor.

The Court: Don't ask leading questions.

Object to the questions before he answers them.

Q. (By Mr. Hupp): Mr. Formhals, have you had occasion to examine your stool from time to time? A. Yes.

Q. What color is it?

A. It has been a dark, coffee ground, you might say, type of refuse.

Q. Have you had this condition at the same times or similar times when you have had diarrhea?

(Testimony of Donald W. Formhals.)

A. Yes. There have been times when there was small—three or four different times there has been small chunks of actual blood in with the mixture. That is what originally got me worried about it.

Q. Have you had medical treatment for this condition? A. Yes, sir.

Q. What medical treatment have you had for this ulcer condition and these symptoms that you have described to us?

A. Well, in and out of Service hospitals over a [89] period of six years. In military service it was in and out of the hospital at different times with different types of X-rays and treatments, medicines and pills, psychiatric—

Q. Since you have been out of the service, have you been under the care of a doctor off and on?

A. Yes, from the day I got out of the service, in fact, I have been under the care of doctors.

Q. Dr. Halverson has been one of these doctors?

A. Yes, sir.

Q. Have you had any other hospitalization?

A. Yes.

Q. When was that?

A. The 1st of September is the last hospitalization, if that is what you mean.

Q. How long did it last?

A. 13 November, and then I had another hemorrhage and turned right back into the hospital the evening of the 29th, I believe it was, or the 30th of November, two weeks after I got out, whenever it

(Testimony of Donald W. Formhals.)

was, and I got out Christmas Eve of '58, that was my last hospitalization.

Q. Which hospital was this?

A. Veterans Hospital in Long Beach.

Q. Did they treat you for an ulcer condition?

A. Yes, they did.

Q. Mr. Formhals, on these occasions when you have [90] had, as you have testified, attacks of diarrhea and bleeding, what effect did this have on your mental condition?

A. At different times different effects?

Q. Describe some of them for me, please.

A. Well, the main thing on the mental condition is just the fact that you make idiotic stunts, you might call them, that doesn't make much sense, after I have been told about them and stopped to realize what has happened and everything is brought back to me in a way that I understand it.

Q. Are there times when you don't have any memory of doing some of the things that you are later told you did? A. Yes.

The Court: Let him testify, counsel. I told you not to ask leading questions.

Mr. Hupp: I am sorry.

The Witness: That went back several years from that particular point there.

Q. (By Mr. Hupp): About June 25th, Mr. Formhals, would you describe your physical condition at and before that time?

A. Starting about the last of March or the first of April, I can't set an exact date, I don't know just

(Testimony of Donald W. Formhals.)

exactly what date, I started having these—well, just [91] as soon as I would get up in the morning I would start having these diarrhea spells, have dizziness when I would first get up in the morning, and started getting concerned over it, and I had been warned by the doctor——

Q. I stopped you because you were getting beyond the scope of the question.

You said you started having this diarrhea. How long had you had this? Had this been continuous to June 25th?

A. Yes. It had been irregular times much longer before that, but as I said, it started the last of March, first of April, and was continuous right up through there, where my weight started dropping tremendously and the stool was just picking up a quantity of blood in it all the time.

Q. What was the color of your stool during this occasion, during this period?

A. It was the black, coffee ground material that it had been before, with intermittent, I would say, chunks of blood.

Q. Very well. Now, let's come to the afternoon of June 25th. What were you doing at the Hemet post office? What were your duties?

A. Starting the first of the day now?

Q. Start after lunch on the 25th.

A. Well, when I came back from lunch at 12:30, I returned to my window. I was operating a stamp window in the register section, selling stamps and so on is what it consists of, and unlocked my drawer,

(Testimony of Donald W. Formhals.)

and another clerk was having his money counted for his quarterly check, and I opened my window as usual.

Q. Did you operate the window for a period of time?

A. Up until the postmaster assigned me to the specific duty of going back and dispatching mail, yes, I run the window from——

Q. Approximately when did that happen, when did the postmaster assign you that duty?

A. About 2:30, I would say; about two hours after I came back from lunch I would say.

Q. What did you do after the postmaster spoke to you?

A. Well, I raised the question, like I have in instances before, why I was the goat to have to go back and case the mail when there had been no help all the rest of the day before, in the morning.

Q. The question is, what did you do, not what you said?

A. Just like I said. I questioned him when he told me to go back to the rear of the post office and case the mail, I questioned him about it, wondering why I was the one that had to go back there, because there was already [93] plenty of help.

Q. After this conversation, did you go back to the rear of the post office? A. Yes, I did.

Q. What did you do there?

A. Commenced sorting mail, like I said, about 2:30. I had been there about 15 or 20 minutes, I guess, and I hadn't been feeling good all day the

(Testimony of Donald W. Formhals.)

way it was, and I had my glasses, was wearing my glasses, and after I had been there 15 or 20 minutes, I judge, I had one of my sick spells and I went into the rest room, and I made a remark to the superintendent of mails at the time that I wasn't feeling good and I didn't know whether I was going to be able to finish out the day or not. I had mentioned it to him several times before, that I might have to go and see the doctor and get some stuff to dry my stomach up and get me to feeling better. So I hung on another five or ten minutes and I had another spell like when they started. When they get started, they keep me going pretty regularly.

Q. As I understand it, you had already gone to the toilet once at this point?

A. I had gone twice.

Q. And now you are back sorting the mail again?

A. Yes, sir.

Q. Then what happened? [94]

A. Well, I guess around—timewise I don't know what time it was, only by previous testimony what time it must have been.

Q. Just tell us what you know of your own knowledge.

A. Timewise I don't know what time it was. I had another one of my spells and I leaned against the casing table. I got to feeling a little bit better and got straightened up to my likings and started casing the mail and I got sick again and headed for the bathroom, and had this handful of mail in my possession when I went in there, and that was it.

(Testimony of Donald W. Formhals.)

Q. Did you sit down on the toilet?

A. Yes, yes.

Q. What do you remember happened after then?

A. The door flew open, coming in from the outside, evidently from the closet or entrance from the outside, whichever it happens to be, and the two inspectors came in.

Q. Do you recall anything that happened before the inspectors came in?

A. No, sir, I don't.

Q. Okay. What happened then?

A. Well, when they came in, they were coming up to me, and it startled me, and, well, I got up off the stool and the mail that I had in my hand I—let's see, I put it over behind on a wash basin, that is where I was [95] moved around to the wash basin, I put the mail behind the handle on the wash basin.

Q. Do you recall picking any papers up?

A. Picking any papers up?

Q. Yes. A. No.

Q. Do you recall any conversation with the postal inspectors in the wash room?

A. Yes, after—I don't know how long, I don't have any idea how long we had been standing there, but after one of them mentioned the fact of—asked me what I was doing with the mail, and this and that, one of them made the remark, said, "Here it is," and produced the two \$1.00 bills.

Q. Do you have any recollection of handing these to the postal inspectors?

A. No, I don't have any recollection of handing

(Testimony of Donald W. Formhals.)

them to them. The first thing I know about any money is one of them remarking to the other, "Here is two of them," and they was shown to me at that time. That is what I was trying to get at.

Q. Then what happened?

A. One of them took the mail, and I was asked—I got pretty shook up at the time and I start crying, and I was all upset emotionally at the time trying to figure out what exactly was going on, where I could get a picture of [96] it, and one of them asked me if I wanted to save myself some embarrassment, if we could go around the outside of the post office, or wanted to go through there, and I said I don't want to go through the post office if I could get out of it.

Q. What happened then? Did you leave the men's room? A. Yes.

Q. Where did you proceed to?

A. We went out through the same door that they came in, around the outside of the post office and around the front, and I got on the outside and got some fresh air and got to feeling a little better, and got around into the front.

Q. Where did you go?

A. In the postmaster's office.

Q. Who was present?

A. The postmaster was in the office when we went in there.

Q. Who else was present in the office with you?

A. The two postal inspectors and myself was the ones that went in.

(Testimony of Donald W. Formhals.)

Q. Then will you describe what happened in the office of the postmaster?

A. Well, the first remark that I remember being made was one of the inspectors told the postmaster what [97] they had found and asked him if he wanted to stay in there while the questioning was going on. And he said, No, he had better leave.

And he went from there out the door into the—well, what we call the cage. It is in the register section. It is all caged in. He went in that part towards the back of the post office.

Q. Did the postal inspectors remain?

A. Yes.

Q. Very well. Did you have any conversation with them? A. Yes.

Q. What was that conversation?

A. I got emotionally upset again, and I don't remember an awful lot about what the conversation was. Started the same line about where I was born, age, how long I worked in the post office, and so on and so forth.

Q. Let's get into the so on and so forth. What did they say and what did you say, to the best of your recollection? Of course I know you can't remember the exact words, but give us the substance of what was said.

A. Well, during the—as the afternoon went on, the questioning was to the best of my knowledge conversation between the two inspectors. One of them would suggest something and the other one would go along with it, and that seemed to be the

(Testimony of Donald W. Formhals.)

extent of my guilt or not being [98] guilty, whatever they was trying me on right there.

Q. What I am getting at is not your feelings about it, but what was said. Tell me as best as you can recollect what was said?

A. It is hard to say what was said. I don't remember an awful lot about what the actual conversation was between the inspectors and myself. It started out asking me what the money was doing on me, and I denied it because I didn't know—to the best of my knowledge there wasn't any money on my person except what they had showed me and said that it was.

Q. Did you place your name on Exhibits 2-A to 2-F here? A. I did later on.

Q. And on the dollar bills?

A. Everything they put in front of me I signed my name to it.

Q. What did the postal inspectors say when they asked you to sign your name? A. To what?

Q. To these Exhibits 2-A to -F.

A. They told me to sign them.

Q. Did they tell you why they wanted them signed?

A. That them was the letters that I had had in my possession, yes. Them was the letters I had in my possession. [99]

Q. What did they say about why they wanted you to sign them?

A. There was no explanation as far as I know.

Q. Did you sign them at their request?

(Testimony of Donald W. Formhals.)

A. Yes. They said those were the letters they found on my person and for me to sign my name to them.

Q. Was one of the inspectors typing?

A. Yes.

Q. Were you talking to the other one or were you talking to both inspectors?

A. I would say both of them, whoever happened to be talking.

Q. Do you have any further recollection as to what was said between you and the inspectors?

A. The part about the six months, that I was supposed to have said about taking mail for six months in the amount of \$50, or something like that, that is all the words of one to the other of the inspectors. One of them made the remark about taking it for six months. And not to my knowledge I haven't taken any. And on a statement that I made later to another concern that was investigating it, to the best of my knowledge I have never opened any first-class mail whatsoever at the post office, or removed any of its contents, or so on. But it was agreed on. [100]

Q. Did you tell the inspectors that you had taken \$50 over the last six months?

A. I did not tell them in my own words that I had taken any amount of money.

Q. Can you remember any other conversation?

A. Nothing except—well, I don't know what time it was, it was just before I went home the inspectors

(Testimony of Donald W. Formhals.)

were, you might say, debating what my status was going to be for the evening, or something like that.

Q. What was your physical condition during this interrogation?

A. I was emotionally upset very much all afternoon, I was sick, I complained to them I was sick in the morning before I went back there and it perturbed me very much to be assigned to that job because I wasn't feeling well.

Q. My question was directed to the time of the interrogation, what was your physical state at that time?

A. I was just plain sick, that's all, and emotionally upset to where it didn't make any difference to me at the time as long as I could get out of there and go home. And I didn't care much what happened, period.

Q. You have seen Exhibit 1, I take it, which is the statement typed—as testified to by Inspector Lynch that he typed, have you seen that [101] before?

A. Yes, sir, I did.

Q. Is that your signature on the statement?

A. Yes, it is.

Q. On each page?

A. Yes. If it was on both pages, I guess it was.

Q. If there is any doubt, let's look at it.

Is that your signature on the first and second pages?

A. Yes, it is.

Q. Is that your handwriting on the second page where there is a handwritten sentence?

A. Yes, it is my handwriting.

(Testimony of Donald W. Formhals.)

Q. Now, would you read what you wrote in your handwriting?

A. "I have read my statement of two pages and I say that everything herein is the truth."

Q. You wrote that in your handwriting?

A. That is my handwriting.

Q. Did you read the statement over before you wrote that and signed your name?

A. I did not.

Q. What was——

A. I remember a discussion about it before I signed my name.

Q. What was the discussion? [102]

A. One of them instructed me to read it, and I told them if they let me out of there—that I wasn't interested in reading it, if I had to sign it, I would sign it, that I wanted to leave and go home. They asked me—one of them asked me, rather, if I would go home if I was released to go, and I said yes. And the two of them went out in the hallway and discussed it. I presume that is what it was about. They came back in and asked me what I intended on doing if they would let me go, and I made some gesture like so (indicating), and one of them says, "Well, that is what I thought," to that effect. One of them asked the other one if they thought it was okay to let me go, and he said he guessed so, and told me to go straight home.

Q. Finish your answer.

A. I told them if they needed anybody to vouch for me, that I would name anybody, if they would

(Testimony of Donald W. Formhals.)

just let me get out of there so I could collect my wits and get straightened up; that I could get anybody to vouch for me to make sure of my appearance back there. I was asked to come back that evening. That is what I was getting at.

Q. We are getting beyond the scope of the question now. A. Okay.

Q. Did you read this before you signed it?

A. Definitely not, I didn't read it. [103]

Q. What was your physical state by the time you signed this paper?

A. There wasn't much physical state left. Like I said, I didn't care much what happened as long as I would get out of there. I was just so upset, and I had been crying and acting up in there, and I was laying down with my head on the little table in the office there most of the time, and I just wasn't paying much attention to what was going on, I just wanted to get out of there, get outside. I didn't care where I went.

Q. Do you have any recollection at all of what happened between the time you entered the toilet room and the time the postal inspectors broke in?

A. No, I don't actually remember even going in the toilet room itself. I remember having the succession of diarrhea spells. I don't actually remember going into the toilet room itself.

Q. To your knowledge, did you ever have the intent to steal or embezzle any mail?

A. Negative.

Q. You mean——

(Testimony of Donald W. Formhals.)

A. No reason whatsoever.

Mr. Hupp: You may cross-examine.

The Court: Well, it is 4:00 o'clock. We will recess. [104]

* * *

Cross-Examination

By Mr. Osborne: [108]

* * *

Q. Directing your attention to the 25th of June last year, as you testified yesterday, you were able to recall the events up until approximately 4:30 is that correct?

A. Some time before then. I don't know just exactly what the time was.

Q. Up to approximately the time you entered the men's room?

A. Just a little while before then. It was when I had my last spell, yes, dizziness, and I sat down.

Q. Going back over what you testified, you remember in some detail what you were doing on that day, is that not correct?

A. During the day?

Q. During the afternoon prior to the time you entered [110] the men's room?

A. Yes, sir.

Q. Was it your testimony that you recall working at a window selling stamps for a while?

A. During the morning, sir.

Q. And then being sent back to sort mail?

A. Yes, sir.

Q. In the afternoon.

(Testimony of Donald W. Formhals.)

These letters that you were sorting, would you describe the source of these letters, how had these letters arrived on the desk in front of you?

A. Either by myself or someone else running them through the cancelling machine and placing them on the table in front of me.

Q. Can you describe for us the procedure that you followed in that post office picking up mail, bringing it in the post office and running it through?

Let me be more specific.

I refer specifically to the mail drops in the post office building, would you describe how those are processed?

A. When the letters are dropped in the box and when I go to get them, is that what you mean?

Q. Yes.

A. Okay. The letters are dropped from the outside, [111] there is a large entrance inside the post office, depending upon the amount that is in the drop, picking them up in your hands or a table, whatever will hold the amount that was there, taking the amount back to another table, putting all the stamps and everything in the same direction, same size letters in the same size piles, and inserting them into the cancelling machine as it took them and cancelling the stamps.

Q. Then what happens?

A. Setting them over onto the sorting table—the distributing table that you distribute the [112] letters.

(Testimony of Donald W. Formhals.)

Q. (By Mr. Osborne): Let's get this straight. Is it your testimony today that you don't recall entering the men's room?

A. No, sir, I definitely don't.

Q. Isn't it true that last week when you were talking to Dr. McNeil you stated to him that you did remember?

A. I did not tell him I remembered entering the room. I remember leaving for the bath room, and that was the extent of my conversation in regards to the men's room at all.

Q. How far is it from the sorting desk to the men's room?

A. The length of this court room, I would say.

Q. Is it your testimony today that somewhere between the sorting desk and the men's room you lost your memory?

A. Well, either at the sorting desk—I [119] wouldn't say necessarily it was between. It was possibly between there, yes.

Q. It must have been somewhere between, since you remember leaving for the men's room but you don't remember arriving?

A. Yes.

Q. And your memory again returned a few minutes after you left the men's room when you were in the postmaster's office?

A. When the inspectors grabbed me when I was in the men's room, it shook me to my senses to where I recall.

Q. Mr. Formhals, perhaps I misconceived your testimony, but is it true to state that you are not

(Testimony of Donald W. Formhals.)

denying that you took these letters into the men's room; is that correct?

A. I am denying that I did it with my own knowledge.

Q. You are not denying that you physically carried them in? A. I must have.

Q. Is it also true to say that you are not denying that you must have torn up that letter?

A. It is hard to deny.

Q. You don't remember, but you are not denying it? A. It has got my signature on it.

Q. What do you mean it has your signature on it? [120]

A. I just say the same thing. To the best of my knowledge at the time I wasn't aware of it, no.

Q. You are not denying it, however?

Let's put the question this way: Outside of the postal inspectors, do you recall anyone else being in that men's room when you were apprehended?

A. I don't know whether he was in there—there was a man either in there or came in just very shortly afterwards, and they asked him to leave. Whether he was in there at the time, I couldn't tell you whether he was or not. I know there was a man who was in there later and was told to leave, that's all I know.

Q. Let me see if I can get an answer to the original question now. Isn't it true that you are not denying that you are the one that tore up the letter; you are simply saying that you don't remember?

(Testimony of Donald W. Formhals.)

A. I definitely don't remember opening the letter, no.

Q. Isn't it true to state that you are not denying that you signed these letters and that you signed this statement; you are simply stating, "I don't remember"?

A. Yes, sir, it is my signature, I must have signed them, but I definitely don't remember the incidents at the time when I was doing it, I know that.

Q. Your loss of memory is confined to a period of [121] approximately five to 10 minutes, is that not true?

A. Well, if that was the time period. I couldn't swear to the exact time. I just have no idea.

Q. Very well. It was confined to the time that you were in the men's room, is that correct?

A. Somewhere between there and the time that I left it.

Q. Going back to the events that occurred in the postmaster's office until such time as you left, you testified you recall certain questions being put to you and making certain answers, is that correct?

A. Yes.

Q. Do you recall being asked about whether or not you opened up this one letter and extracted money from there?

A. I don't remember being asked about it, no.

Q. Do you recall answering that question that you tore open one of the letters and removed two \$1.00 bills?

(Testimony of Donald W. Formhals.)

A. I don't remember answering that question to anybody, no.

Q. Do you recall being asked why you had the five other letters resting on your leg?

A. Not why I had five other letters; I was asked why I had the mail in the bath room.

Q. You recall that question? [122]

A. That question was asked.

Q. What was your answer?

A. There was no answer. I had no reason for it.

Q. In other words, when you were asked this question, it is your testimony today that you merely remained silent?

A. No. I just said at the time that I had no reason for having them in there. I was asked why the letters were in there, why I had them in there, rather, and I said I had no reason whatsoever for it. That was my answer.

Q. Then you do recall this particular question and answer. Do you recall the question being put to you about whether or not you had ever taken other letters into the men's room? A. Yes.

Q. You do recall that question?

A. Yes.

Q. Do you recall what your answer was?

A. To the best of my knowledge, I never remembered taking any mail in there. I have no reason to take mail in the bath room.

Q. In other words, your loss of memory is rather selective as to what you remember and what you

(Testimony of Donald W. Formhals.)

don't remember, is that correct? You have a spotty memory during this period? [123]

A. During the latter part of the afternoon, yes.

Q. You remember some things, but you don't remember others? A. Very true.

Q. Is it your testimony today that you don't remember signing—first let me ask for Government's Exhibit No. 1.

I show you Government's Exhibit No. 1 and ask you if you recognize this document.

A. Yes, I know what it is now.

Q. Do you recall having seen that document on June 25, 1958?

A. I don't recall seeing it. I may have seen it and not known what it was.

Q. Is that your handwriting on there?

A. Yes, I am afraid it is.

Q. Will you read what you have written on there?

A. "I have read my statement of two pages and I say that everything herein is the truth." That's the words of the typewritten line above.

Q. Is that your handwriting?

A. I am afraid it is. It looks like it. [124]

* * *

Q. (By Mr. Osborne): During the period of that conversation, did you have occasion to make any statements regarding the taking of this mail which is entitled Government's Exhibits 2-A, -B, -C, -D, -E, and -F?

(Testimony of Donald W. Formhals.)

A. I never made any statements about them. It was partially covered in the statement of charges.

Q. What was this statement of charges?

Mr. Hupp: I will object. This is irrelevant, immaterial, and not within the scope of the direct examination. [150]

The Court: The objection is sustained unless you are trying to get at an admission that was made, and if so, ask him. If that is what you are after, it is admissible, if it refers to an admission.

Q. (By Mr. Osborne): Isn't it true, Mr. Formhals, that at that time you signed a charge sheet which charged you for administrative purposes with the commission of the offense of stealing the six letters?

Mr. Hupp: Objection. This is irrelevant.

Mr. Osborne: I don't believe an admission is irrelevant, your Honor.

The Court: The objection is overruled.

Mr. Osborne: Would you answer the question, please?

The Witness: How would you state that?

Mr. Osborne: Will you read the question, Mr. Reporter?

(The question was read by the reporter.)

Mr. Osborne: The further objection, your Honor, that this is not the best evidence.

The Court: The objection is sustained. You may ask him if he signed a document at that time.

Mr. Osborne: Very well.

(Testimony of Donald W. Formhals.)

The Court: And then you may present the document to him, if you have it. That is the best [151] evidence of what is stated therein.

Q. (By Mr. Osborne): Mr. Formhals, at the time that these charges were presented to you, did you deny the charges?

A. That evening, the letter of charges?

Q. Yes.

A. I never denied, admitted, or nothing. I signed the letter.

Q. Did you read the letter that night?

A. Yes, I read it.

Q. And did you make any denial of the matter contained therein?

A. Never made any statement about it at all. No denial.

Q. Isn't it true that you simply signed a receipt for having taken a copy of the charges?

A. Yes, sir.

Mr. Osborne: Let me ask that this be marked Government's Exhibit for identification No. 4. I have given defense counsel a copy of this for his inspection.

The Clerk: Government's Exhibit 4 marked.

(The exhibit referred to was marked Government's Exhibit No. 4 for identification.)

Mr. Osborne: Do you have any objection to this?

Mr. Hupp: I most certainly do have an objection. [152] It is irrelevant and immaterial and has nothing to do with the issues of this case.

(Testimony of Donald W. Formhals.)

The Court: There isn't any question before the court to object to. He has asked to have something marked.

Mr. Hupp: He just asked me if I had any objection to the admission of this into evidence, and I do.

Q. (By Mr. Osborne): Mr. Formhals, I show you for identification Government's Exhibit No. 4 and ask you if you have seen this document before?

A. Yes, I have a copy of it myself.

Q. Do you recognize that document?

A. I have got a copy, an identical copy of it in my own file.

Q. Does your signature appear thereon?

A. Yes.

Q. Any other writing in your handwriting?

A. Yes. "I, Donald W. Formhals, have received the original copy of this letter of charges, this date of June 25, 1958. Donald W. Formhals."

Q. Does that letter contain a statement as to——

The Court: Counsel, don't ask him what the letter contains. It itself is the best evidence of what it contains. Whether it is admissible or not, there first must be a foundation for it.

It is not admissible in evidence for what it [153] states unless the document itself is admissible in evidence.

Mr. Osborne: Your Honor, at this time I would like to offer this in evidence for this reason: It has been stated to be a charge sheet and the defendant has admitted he failed to deny it.

(Testimony of Donald W. Formhals.)

The Court: Counsel, I will look at it if you are offering it in evidence.

For what purpose is it offered?

Mr. Osborne: For the purpose of showing the defendant admitted——

Mr. Hupp: I will object to counsel——

The Court: Is it offered as an admission against interest?

Mr. Osborne: Yes, by silence.

The Court: Now, I will read it and see whether it is.

The objection is sustained. He hasn't signed this document. All he has signed is, "I have received the original copy of the document."

Mr. Osborne: Your Honor, if I may make a comment on that.

Mr. Hupp: May it please the court——

Mr. Osborne: May we approach the bench on this matter?

(The following proceedings were had at the bench [154] outside the hearing of the jury:)

Mr. Osborne: Your Honor, it is my contention that this contains a statement of charges covering precisely what the indictment covers. This was presented to the defendant and the defendant has admitted that he failed to deny it, and that is an admission against interest by virtue of his silence. I submit it is a well-established rule of evidence that when a man is accused of a crime and he fails to deny it, it is an admission against that person.

(Testimony of Donald W. Formhals.)

The Court: Mr. Osborne, let me tell you the rule with respect to admissions by silence.

Admissions by silence only occur under circumstances where a denial is normally required or expected.

Mr. Osborne: That is correct.

The Court: If a person is accused of an offense under circumstances where normally they would be expected to reply, and they do not, then it is an admission by silence. But where they are handed a document—this is no more an admission than when you hand him an indictment in court. This is charges by the postal department, and it isn't any different than when you hand them a copy of an indictment. When you hand a defendant a copy of the indictment, you don't think that because he takes it and walks away and hands it to his attorney—you don't think [155] that he has admitted by silence that he has committed the offense, do you?

It is exactly the same situation. It is no admission. He simply receipted for it.

It is quite apparent that that was all that was expected of him. They didn't even ask him. They didn't give it to him in a form in which he was expected to sign it. All he was asked to do was to receipt for it.

It is no more an admission than the receipt of a pleading.

Mr. Osborne: I will offer this again at a later time. I have a different conception of the circumstances surrounding this.

The Court: The objection to its admission is sustained.

(Whereupon the proceedings were resumed in open court within the hearing of the jury, as follows:) [156]

* * *

WILLARD W. LYNCH

recalled as a witness on behalf of the government, in rebuttal, having been heretofore duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Osborne:

Q. Mr. Lynch, directing your attention to the 25th [173] of June, 1958, from 4:30 to 6:30 that evening did you have the opportunity to closely observe the appearance of the defendant?

A. Yes, sir.

Q. Did you observe—let me ask you this question: At any time during that period of time was the defendant crying? A. Was what?

Q. At any time during that period of time was the defendant crying? A. No, sir.

Q. Was he hysterical? A. No, sir.

Q. Did you notice his eyes being dilated?

A. No, sir.

Q. Later on that evening did you have occasion to see the defendant again? A. Yes.

Q. What time was that?

A. It was between 11:30 and 12:00 on the same date on June 25th.

(Testimony of Willard W. Lynch.)

Q. 11:30 and 12:00 that evening?

A. Between 11:30 and 12:00 on that date. It was still the same day of June 25th. There was an understanding that he was to meet Mr. Wilson, the postmaster, [174] and me at the designated motel for—may I give the reason here?—for the acceptance of this administrative letter of charges. And I arrived about 11:30, Mr. Wilson was there, Mr. Formhals was not. Mr. Wilson—I have never called Mr. Formhals at his home. He was summoned to the motel to meet us by Mr. Wilson.

Mr. Hupp: I object to that as not responsive to the question.

Q. (By Mr. Osborne): Are you certain of the time? A. Yes, I am.

Q. How are you certain?

A. I am certain for the reason that—it was our desire to present this administrative letter of charges within the same day, and had Mr. Formhals been present as anticipated, it would have been presented within that day. However, it was just about midnight, high midnight, at the time the letter was actually presented to the man, so it was placed as given to him on June 25th, 1958. I remember specifically I left Riverside about 10:30.

Q. When you handed this letter to the defendant, did he read the letter in your presence?

A. Yes, he did.

Q. Now, subsequent to that how long did the defendant stay in that motel?

A. Well, he stayed upwards to an hour. I would

(Testimony of Willard W. Lynch.)

say [175] to about 1:00 o'clock. Mr. Wilson, as I said, was there, too, and he commenced to leave.

Q. What time did Mr. Wilson leave?

A. I recall that I and Mr. Formhals pushed the postmaster's car, after which Mr. Formhals would seemingly persist in staying, he was very talkative.

Mr. Hupp: I ask that that be stricken.

The Court: I couldn't hear you, counsel.

Mr. Hupp: I objected to the part about persisted in something or other as a conclusion of the witness and ask that it be stricken.

The Witness: I would like to say this——

Mr. Hupp: There is no question pending now. Just a minute.

The Court: Counsel, you objected. It is in. You mean you make a motion to strike it?

Mr. Hupp: Yes.

The Court: Granted. That portion may be stricken.

Q. (By Mr. Osborne): Mr. Lynch, after the defendant left, or after Mr. Wilson left, did the defendant then remain?

A. Yes, he remained for another 10 to 15 minutes.

Q. Throughout the entire period of time while the defendant and Mr. Wilson and yourself were at the motel was [176] there any conversation concerning the embezzlement of mail by Mr. Formhals?

A. Yes. After the actual presentation of this letter, hand-to-hand receipt, and his acknowledgement on the copies of this letter, that that business was

(Testimony of Willard W. Lynch.)

dispensed, we could have all gone to bed, but I would say this meeting lasted for upwards to an hour, and I remember particularly he was very talkative. I was tired and wanted to go to bed, I was in my motel room, and——

Q. Did he discuss the embezzlement itself?

A. Yes.

Q. Do you recall what he stated?

Mr. Hupp: Wait a minute. I object on the ground this is not properly part of rebuttal testimony. It should have been brought out on direct.

The Court: The objection is sustained. It should have been brought out on direct.

Mr. Osborne: The defendant went into this later meeting. I did not.

The Court: The objection is sustained.

Q. (By Mr. Osborne): Mr. Lynch, going back again to 5:40 when the statement, Government's Exhibit No. 1, was presented to Mr. Formhals, do you recall observing the defendant during this period of time? A. Yes, sir. [177]

Q. Do you recall whether or not he took the time required to read that statement?

A. Yes, he did.

Q. Will you describe what happened?

A. He actually read it page for page, and he was requested to rise and take the little oath.

Q. Did he take the oath?

A. He certainly did in the postmaster's office. It was 5:50 p.m.

(Testimony of Willard W. Lynch.)

Q. How much time did he take in reading that statement?

A. I would say he took five to 10 minutes.

Q. Were you standing and waiting?

A. Yes. We were all in the confines of the postmaster's office.

Q. Did the defendant indicate during this period of time to you in any way that he was willing to sign anything in order to leave? A. No.

Q. What were the conditions of his leaving?

A. His leaving was just this: He left about 6:00 o'clock, which was actually about an hour and a half from the time he was initially approached. Very frankly, where we were cognizant——

Mr. Hupp: I object to anything further. [178]

Q. (By Mr. Osborne): I am asking what were the conditions.

A. The conditions were, there was an understanding that later that evening he was to meet Mr. Wilson, who desired to be present, he was the administrator of the post office, and myself, in this motel room, for the acceptance of this letter. It was understood that he was going home, he was permitted to go to his home and family, it was understood that he had a job the next morning starting at about 2:30 or 3:00 in the morning, and that he would not lose that day's work. In other cases, in cases in Los Angeles, we place the man——

Mr. Hupp: Just a moment.

The Court: Just answer the question.

The Witness: All right, sir.

(Testimony of Willard W. Lynch.)

Q. (By Mr. Osborne): Mr. Lynch, you stated you have been a postal inspector for a considerable length of time. A. 11 years.

Q. I would like to ask you to examine Government's Exhibits 2-A through -F and ask you based on your experience if there is any indication, anything on the face of those letters which would lead you to believe that they would not all be together on a sorting table in one continuous line. [179]

A. Yes, sir.

Q. What are those indications?

A. These two letters here were test letters; these four were not (indicating). These two letters were placed into the mails 10 minutes apart in different places. That means these two could not possibly have been together. These other four letters were mailed by three different patrons at different points in the city that afternoon.

Q. Have you contacted these people?

A. Yes, I have, by correspondence.

Also, here we have a different postmark on the one letter, 3:00 p.m., whereas on the other letter it is 5:00 p.m.

At the Hemet post office the postmark is changed to show each succeeding dispatch of mails. The 3:00 p.m. is followed by the 5:00 p.m., which indicates this letter was in the post office prior to 3:00 p.m., whereas these other five letters were in the post office, went through the cancelling machine some time after 3:00 but before 5:00 p.m.

(Testimony of Willard W. Lynch.)

Q. These two test letters, were they both deposited in the same drop?

A. No. The one test letter, Exhibit 2-F, was placed in the lobby drop at 3:30 p.m., Exhibit 2-A was [180] placed in the outside courtesy box at 3:40 p.m., ten minutes apart, by me.

Q. Based on your experience as a postal inspector, is it likely that those would have all been together?

Mr. Hupp: I object to this as——

The Witness: It is impossible.

Mr. Hupp: Just a minute. Don't answer the question while I am objecting, please.

I object to this as calling for a conclusion of the witness and ask that the answer be stricken.

The Court: The objection is overruled.

The Witness: These letters could not have been all as a unit of six, or even as a unit of less than six, because of five different representative mailing points in the city.

Mr. Osborne: I have no further questions.

Mr. Hupp: May I have a moment to confer with my client?

Cross-Examination

By Mr. Hupp:

Q. Inspector Lynch, with regard to this matter of the cancelling of these letters, they go through the cancelling machine before they are sorted into pigeon holes? A. That is right. [181]

Q. After they go through the cancelling machine,

(Testimony of Willard W. Lynch.)

then aren't they sorted into various sized envelopes before they are put in pigeon holes?

A. Some places, yes; some places, no. In a place like Hemet, they should go from the cancelling machine——

Q. Do you know?

A. At Hemet they would go from the cancelling machine to the one dispatch case.

Q. Do you know whether or not they were sorted to size at Hemet?

A. I can't say that exactly at Hemet. They should not have been. Do you mean longs and shorts, is that what you are talking about? [182]

* * *

INSTRUCTIONS TO THE JURY

The jurors are the sole and exclusive judges of the effect and value of evidence addressed to them and of the credibility of the witnesses who have testified in the case. The character of the witnesses, as shown by the evidence, should be taken into consideration for the purpose of determining their credibility, whether or not they have spoken the truth. The jury may scrutinize the manner of witnesses while on the stand, and may consider their relation to the case, if any, and also their degree of intelligence. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies; his interest in the case, if any, or his bias or prejudice, if any,

against one or any of the parties; by the character of his testimony, or by evidence affecting his character for truth, honesty or integrity, or by contradictory evidence. A witness may be impeached also by evidence that at other times he has made statements inconsistent with his present testimony as to any matter material to the cause on trial.

A witness wilfully false in one material part of his or her testimony is to be distrusted in others. The jury may reject the whole of the testimony of a witness who has wilfully sworn falsely as to a material point. If you are convinced that a witness has stated what was untrue as to a material point, not as a result of mistake or [199] inadvertence, but wilfully and with the design to deceive, then you may treat all of his or her testimony with distrust and suspicion, and reject all unless you shall be convinced that he or she has in other particulars sworn to the truth. [200]

* * *

The Court: Has the government any objections to any instructions given or the omission of any instructions?

Mr. Osborne: I was not able to determine whether you gave an instruction fully covering the credibility of the accused and inconsistent statements as to topics.

The Court: I don't quite understand you. Are you objecting to an instruction?

Mr. Osborne: No. I don't believe that that was given, if I followed the instructions carefully, as to

judging the credibility of the defendant's testimony and the weight to be given to it, and also as to the effect of inconsistent statements.

The Court: Read into the record what you [208] are objecting to or the omission of.

Mr. Osborne: I am saying the omission of an instruction——

The Court: Read into the record the instruction, the omission of which——

Mr. Hupp: May I suggest that you keep your voice low enough so the jury doesn't hear it?

Mr. Osborne: Yes.

“A defendant who wishes to testify, however, is a competent witness and the defendant's testimony is to be judged in the same way as that of any other witness.”

And also an instruction which reads as follows:

“A witness may be discredited or impeached by contradictory evidence or by evidence that at other times the witness has made statements which are inconsistent with the witness' present testimony. If you believe that any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves. If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness' testimony in other particulars; and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.

* * *

[Endorsed]: Filed May 12, 1959. [209]

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the foregoing documents together with the other items, all of which are listed below, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case; and that said items are the originals unless otherwise shown on this list:

A.

Names and Addresses of Attorneys.

Indictment, filed 7/2/58.

Minute Order 7/21/58, re arraignment and plea.

Minute Order 7/22/58, re plea.

Defendant's Notice of Motion to continue date of trial, filed 8/12/58.

Minute Order 8/12/58, re trial.

Minute Order 12/1/58, re setting for trial.

Minute Order 12/8/58, re setting for trial.

Minute Order 1/26/59, re setting for trial.

Order Appointing Psychiatrist, filed 2/4/59.

Minute Order 2/17/59, re jury trial.

Minute Order 2/18/59, re further jury trial.

Minute Order 2/19/59, re further jury trial.

Verdict, filed 2/19/59.

Report of Edwin E. McNiel, M.D., filed 2/19/59.

Minute Order 3/9/59, re sentence.

Judgment, dated and filed 3/9/59.

Notice of Appeal, filed 3/19/59.

Substitution of Attorneys, filed 3/19/59.

Motion for Order extending time in which to file record and perfect appeal, filed 4/27/59.

Order extending time in which to file and docket record on appeal, filed 4/27/59.

Designation of Record (Appellant), filed 5/20/59.

Counter Designation of Record on Appeal (Appellee), filed 5/22/59.

B.

Two volumes of Reporter's Official Transcript of Proceedings had on: February 17, 1959—Volume I; February 18 & 19, 1959—Volume II.

C.

Plaintiff's Exhibits 1, 2-A to 2-F, inclusive; 3-A, 3-B and 4.

(Note: The exhibits are being retained in this office pending further instructions from the Clerk of the Court of Appeals—most of the exhibits being unopened letters containing money.)

Dated: May 22, 1959.

[Seal] JOHN A. CHILDRESS,
Clerk,

By /s/ WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 16478. United States Court of Appeals for the Ninth Circuit. Donald W. Formhals, Petitioner vs. United States of America, Respondent. Transcript of the Record. Upon Appeal from the United States District Court for the Southern District of California, Central Division.

Filed and Docketed: May 25, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 16478

DONALD W. FORMHALS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON APPEAL
AND DESIGNATION OF RECORD

Comes Now the Appellant and presents a statement of points upon which he intends to rely in his appeal of the above-entitled cause to the United States Court of Appeals for the Ninth Circuit:

I.

The record is void of any competent proof that the letters Appellant is charged with embezzling in all three counts of the indictment had been placed in the United States mails.

II.

The prosecutor engaged in prejudicial conduct in his attempt to introduce as a confession of the accused the signing by the accused of the statement of charges made by the Post Office Department.

III.

The prosecutor was guilty of misconduct in introducing evidence regarding "prior offenses" of the accused knowing that none existed.

IV.

Evidence was wrongly admitted into evidence in regards to the system of handling the mail at the Post Office Department at Hemet for no foundation was made or any showing made that the witness testifying as to the system had knowledge of the same.

V.

Upon hearing evidence in the case that the Appellant was suffering from amnesia in regards to the offense, the Court failed to make a determination as to whether or not the Appellant had a sufficient memory in regards to the facts of the case so as to enable him to effectively co-operate with his counsel in the defense of the case.

VI.

The Court unduly limited the cross-examination of the prosecution witness Wilson relating to the issue of intent of the Appellant.

VII.

The Court failed to instruct the jury in regards to the Appellant as a witness.

* * *

Respectfully submitted,

ANDERSON, ADAMS &
BACON and
THOMAS E. KELLET,

By /s/ ROBERT L. BACON,
Attorneys for Appellant.

[Endorsed]: Filed July 2, 1959.



No. 16478

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DONALD W. FORMHALS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPELLANT'S OPENING BRIEF.

ANDERSON, ADAMS & BACON,

4100 North Rosemead Boulevard,
Rosemead, California,

FRANK E. KELLETT,

1310 Wilshire Boulevard,
Los Angeles 17, California,

Attorneys for Appellant.

FILED

OCT 23 1959

PAUL P. O'BRIEN, CLERK

TOPICAL INDEX

PAGE

Jurisdictional statement	1
Statement of the case.....	2
Statement of facts.....	3
Specifications of error.....	7
Specification of Error I	9
Specification of Error II	11
Specification of Error III	11
Specification of Error IV	13
Specification of Error V	14
Specification of Error VI	15
Conclusion.....	17

TABLE OF AUTHORITIES CITED

CASES	PAGE
Ammerman v. United States, 185 Fed. 1.....	11
Batsell v. United States, 217 F. 2d 257.....	16
Blunt v. United States, 244 Fed. 355.....	12
Brown v. United States, 202 F. 2d 474.....	15
Gunther v. United States, 215 F. 2d 493.....	9, 10
Hopt v. People of Utah, 110 U. S. 574.....	15
Krulewitch v. United States, 336 U. S. 440.....	18
Logan v. United States, 192 F. 2d 388.....	18
Lyles v. United States, 254 Fed. 725.....	12
People v. Butterfield, 40 Cal. App. 2d 725, 105 P. 2d 628.....	13
People v. Mallette, 39 Cal. App. 2d 294, 102 P. 2d 1084.....	12
People v. Ridgeway, 89 Cal. App. 615, 265 Pac. 349.....	13
People v. Rodundo, 44 Cal. 538, 117 Pac. 573.....	14
Robinson v. United States, 32 F. 2d 505.....	11
United States v. Bourjaily, 167 F. 2d 993.....	15
United States v. Schneiderman, 106 Fed. Supp. 892.....	17
Van Gammeren v. City of Fresno, 51 Cal. App. 2d 235, 124 P. 2d 621.....	14
Watson v. United States, 234 F. 2d 42.....	10
Wesson v. United States, 164 F. 2d 50.....	17
Zimberg v. United States, 142 F. 2d 132.....	16

STATUTES

Civil Code, Sec. 3532.....	14
United States Code, Title 18, Sec. 1709.....	1
United States Code, Title 18, Sec. 3231.....	1
United States Code, Title 18, Sec. 4244.....	9, 10
United States Code, Title 28, Sec. 1291.....	1
United States Code, Title 28, Sec. 1294.....	1

TEXTBOOK

1 Wharton's Criminal Evidence, Sec. 213.....	13
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No. 16478
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

DONALD W. FORMHALS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPELLANT'S OPENING BRIEF.

Jurisdictional Statement.

This is an appeal from a judgment of the United States District Court for the Southern District of California, adjudging the appellant to be guilty of three counts of an indictment charging him with embezzlement of letters entrusted to him while a Postal Service employee, in violation of Section 1709 of Title 18 of the United States Code [T. 9, 10].

The violations are alleged to have occurred in Riverside County, California, and within the Central Division of the Southern District of California [T. 3, 4].

The jurisdiction of the District Court was based upon Section 3231 of Title 18, United States Code. This Court has jurisdiction to entertain this appeal and to review the judgment in question under the provisions of Sections 1291 and 1294 of Title 28, United States Code.

Statement of the Case.

The appellant was indicted on July 2, 1958, by the grand jury on charges of embezzling letters entrusted to him as a postal employee, which letters were intended to be conveyed by mail. The indictment was in three counts, charging the embezzlement of three different letters on June 25, 1958 [T. 3]. The appellant was arraigned on July 21, 1958, before the Honorable Peirson M. Hall. The matter was continued on the court's own motion to July 22, 1958, for plea and to allow appellant to secure counsel [T. 5]. On July 22, 1958, the appellant entered his plea of not guilty to each of the three counts and the matter was set for trial on August 12, 1958 [T. 5]. On August 12, 1958, the government by motion raised the question of the ability of the appellant to then defend himself and assist his counsel in the presentation of his defense as well as appellant's mental condition at the time of the alleged offense [T. 6]. The matter was continued to February 17, 1959, for trial. The court appointed Dr. Edwin E. McNiel to examine the appellant and render to the court a report of his examination and findings as to the present competency to defend himself and assist his counsel and as to his mental condition at the time of the alleged offense [T. 6, 7]. Dr. McNiel examined the appellant on February 10, 1959 [T. 12]. The appellant went to trial on this matter on February 17, 1959 [T. 23] and was defended by appointed counsel, Harry L. Hupp, Esquire [T. 23]. Dr. McNiel's report was not filed until February 19, 1959 [T. 22]. Not only is the record totally void of any evidence, entry or the like indicating that the trial judge had read and considered the report of Dr. McNiel prior to the commencement of the trial on February 17, 1959, but there is absolutely nothing in the record to

indicate that the Court *ever* read or considered this report or any other evidence. Furthermore, the court never conducted any hearing of any kind on the issue of the competency of the appellant to defend himself, and never made any determination of that issue *at any time*. On February 19, 1959, the jury found the appellant guilty of all three counts of the indictment [T. 7, 8]. On March 9, 1959, the appellant was adjudged guilty as charged and sentenced to imprisonment for a period of six months on each of the three counts, the terms to run concurrently [T. 8, 9]. On March 19, 1959, appellant's present counsel filed a Notice of Appeal on his behalf [T. 10, 11]. On July 2, 1959, the statement of Points on Appeal was filed by counsel for appellant [T. 110, 111].

Statement of the Facts.

The appellant was employed as a postal clerk at the Hemet, California, Post Office on June 1, 1954 [T. 24, 25]. On June 25, 1958, he was assigned the duty of dispatching outgoing mail [T. 25]. The person dispatching mail picks up a handful of letters after they have run through the cancelling machine and places them in the various pigeon holes for the various towns, cities and states [T. 25, 26]. The letters he dispatches come from the mail letter drop at the post office or from various collection boxes throughout the city of Hemet [T. 26]. Postal Inspector Willard W. Lynch in June, 1958, was investigating reported losses by patrons of money from first-class letters [T. 29]. The inspection division of the post office has a set procedure to test possible suspects in cases where such losses are reported [T. 30]. They place test letters into the mail. [T. 30]. On June 25, 1958, two such test letters were prepared [T. 31]. The description of these letters is contained in Exhibits 3-A

and 3-B [T. 31]. The test letters themselves are Exhibits 2-A and 2-F [T. 32]. Letter 2-F was deposited in the lobby drop of the Hemet Post Office at 3:30 p.m. on June 25, 1958 [T. 33]. Letter 2-A was so deposited at 3:40 p.m. in the collection box in front of the post office [T. 33]. Witness Lynch testified that Letters 2-B, 2-C, 2-D, and 2-E were letters mailed by patrons of Hemet [T. 33], on the basis that he had letters from the senders as to their mailing of these latter exhibits [T. 33].

After mailing the test letters, Lynch entered the observation gallery and proceeded to observe appellant [T. 33]. At 4:15 P. M., Lynch testified, he saw appellant place a letter into his right side pocket [T. 35]. About 4:30 P. M. appellant left the dispatching case and entered the toilet room [T. 35, 36]. This witness testified that momentarily later he heard the tearing of paper [T. 36], and immediately went through a break-out door and into the toilet and observed appellant seated on a commode [T. 36]. He testified that a torn letter was observed directly below appellant [T. 36] and currency notes were protruding from his left shirt pocket [T. 37]; that the torn letter was recovered and that five other letters were in the possession of appellant at that time [T. 37]. The appellant then went with the Inspector to the Postmaster's office [T. 39]. Appellant was then interrogated by the Inspector [T. 39]. The Postal Inspector stated that the appellant admitted that he took the six letters and threw the particles into the commode [T. 40]; that he took those particular letters because they were going to different charitable organizations in the country [T. 41]; that he had removed

the \$2.00 currency bills from the torn letter [T. 41]; that he had been “. . . committing depredation on the mails . . .” for six months and had derived \$50.00 [T. 42]. The appellant signed a statement [Government Exhibit 1] to the above effect [T. 43].

The appellant took the stand in his own behalf and testified that he was suffering from a duodenal ulcer [T. 70], with severe intermittent diarrhea and bleeding tarry stool [T. 71]. He had been treated for the condition in service hospitals for a period of six years [T. 72] and was also under the care of a private doctor, Glen Halverson, M.D. [T. 72]. Appellant's bleeding and black stool became continuous from the first of April, 1958, to June 25, 1958 [T. 74]. About 2:30 P. M. on June 25, 1958, appellant commenced sorting mail [T. 75]. Before that time on this day he had to go to the toilet twice because of his condition [T. 76]. He again had to go to the toilet and headed there with a handful of mail in his possession [T. 76]. He did not remember anything from the time he sat down on the toilet until the inspectors came in [T. 77]. He did not remember picking up anything [T. 77]. The inspectors asked him what he was doing with the mail and one said “Here it is” and produced two \$1.00 bills [T. 77]. One inspector took the mail [T. 78] and appellant started crying [T. 78]. He went to the postmaster's office [T. 78] and was questioned by the inspectors [T. 79]. He signed his name on Exhibits 2-A or 2-F at the request of the inspector [T. 80]. He could not recall the conversation with the inspectors at that time ex-

cept that he didn't tell them he took \$50.00 [T. 81]. He signed his name to the statement introduced as Government Exhibit 1, [T. 82] but didn't read it before signing it [T. 84]. He was emotionally very upset [T. 85].

Dr. Glen Halverson testified he was a physician and surgeon and had been so engaged since 1935 [T. 45]. That he first saw appellant in January, 1955 [T. 46]. and commenced to treat him for a duodenal ulcer [T. 46]. That diarrhea and bleeding through the intestinal tract are relatively common ailments of persons suffering from a duodenal ulcer [T. 47]. That when this condition of bleeding and black stools continues for a period of a week or two, the person would eventually go into a coma [T. 49]. If their condition were something less than the coma stage, they would act reasonably normal but at a later date would be unable to recall any actions that they did, or any events that transpired during this time [T. 49]. The person would also possibly act somewhat dazed [T. 50]. In October, 1955, Dr. Halverson observed appellant in a daze after he had suffered from a prolonged spell [T. 50]. He did not comprehend what was going on at that time [T. 50]. Dr. Halverson testified that the loss of memory resulting to persons suffering from loss of blood from duodenal ulcers was the result of a physical condition; [T. 51] that such persons may or may not realize what they are doing [T. 52], but would possibly appear to be acting normally [T. 54]. Dr. Halverson did not examine appellant at any time within two or three weeks before June 25, 1958, [T. 55].

In rebuttal, Dr. Edwin E. McNiel testified he was a medical doctor specializing in neurology and psychology [T. 58], and that he had examined the appellant on one occasion [T. 59]. He testified that persons suffering from bleeding ulcers, could, if a loss of considerable blood occurred in a short time, proceed to a point of unconsciousness [T. 60], and that it is more likely for a person so suffering to have a loss of memory rather than a loss of reasoning ability [T. 62]. He was of the opinion that the appellant was sane at the time of the offense charged in this matter [T. 64] but it is possible that he might have suffered a loss of memory as to what happened [T. 64].

Specifications of Error.

I.

The District Court erred in that upon the question being raised by the Prosecution as to the competency of the appellant to defend himself and assist his counsel, the court failed to make any determination as to appellant's competency to stand trial. (Statement of Points on Appeal, No. V [T. 111]).

II.

The District Court erred in not instructing the jury to totally disregard the evidence introduced by the prosecution in regard to the statement of charges signed by the appellant, which was claimed to be a confession of the accused. (Statement of Points on Appeal, No. II [T. 110]).

III.

The District Court erred in limiting the cross-examination of the prosecution's witness, Norman H. Wilson, relating to the issue of criminal intent of the appellant. (Statement of Points on Appeal, No. VI [T. 111]).

IV.

The District Court erred in not instructing the jury that a defendant's testimony is to be judged in the same way as that of any other witness. (Statement of Points on Appeal, No. VII [T. 111]).

V.

The record in his case is void of any competent proof that the letters appellant is charged with embezzling had been placed in the United States mails. (Statements of Points on Appeal, No. I [T. 110]).

VI.

The District Court erred in allowing Witness Lynch, over objection, to testify in regard to the cancellation time differences on the letters introduced into evidence and whether or not long and short letters would be together in the dispatch case at the Hemet Post Office when the witness admitted he was not familiar with the procedure at the Hemet Post Office (Statements of Points on Appeal, No. IV [T. 111]).

ARGUMENT.

Specification of Error I.

The District Court erred in that upon the question being raised by the Prosecution as to the competency of the appellant to defend himself and assist his counsel, the court failed to make any determination as to appellant's competency to stand trial.

On motion by the prosecuting attorney, the question was raised in open court of the ability of the appellant to presently defend himself and assist his appointed counsel in the preparation and presentation of his defense [T. 6]. While the Court did appoint a doctor to examine the appellant, there was never any judicial determination of competency. The appointed doctor did file a report on the last day of the trial, [T. 11], but there is no indication whatsoever that the trial judge ever received or considered this report, much less ever made any judicial determination of the competency of the accused to stand trial.

This exact same point was raised in *Gunther v. United States* (1954), 215 F. 2d 493, where the Court of Appeals in reversing a rape conviction, held:

“ . . . the failure of the trial court to make its own finding on appellant's competency to stand trial was error.” (*Id.* p. 497).

In a comprehensive analysis of Section 4244 of Title 18 of the United States Code and the legislative history of that Section, the court in the *Gunther* case concludes

that while the statute is not explicit, “. . . the requirement of a subsequent judicial determination of competency to stand trial is implicit therein.” (*Id.* p. 495). The legislative history of this section makes it clear that no medical testimony was contemplated as a substitute for the essential “. . . finding of the court” (*Id.* p. 496). Section 4244 does clearly call for a “judicial determination.” The history of this statute clearly indicates it was intended to codify the inherent power and duty of the *judge* to be assured the man is competent to stand trial, and no amount of medical or other testimony is the decisive factor, but that the ultimate, necessary act is the finding and judgment of the court. (*Id.* p. 495-496).

In *Watsen v. United States* (1956), 234 F. 2d 42, 44, the Court of Appeals in approving and reaffirming the *Gunther* decision, explicitly states that there should be a determination of competency *noted of record*.

In view of the fact that no opportunity was allowed the appellant to present evidence on this issue, this error cannot be corrected by any determination at this time of appellant's competency at the time of the trial in February, 1959. Justice could only be served by remanding this matter for a new trial, preceded by a judicial determination of appellant's competency to stand trial at this time, and appellant should be permitted an opportunity to submit evidence on this issue. This disposition is particularly appropriate in the light of the appointed psychiatrist's testimony at the time of trial that, although in his opinion, the defendant was sane at the time of the commission of the offense, it was possible that he might have suffered a loss of memory as to what happened [T. 64].

Specification of Error II.

The District Court erred in not instructing the jury to totally disregard the evidence introduced by the prosecution in regard to the statement of charges signed by the appellant, which was claimed to be a confession of the accused.

The prosecutor attempted, over strenuous objection, to introduce a "statement of charges" as a confession or admission of the accused. [T. 92, 93]. The document was merely a recitation of what appellant was charged with and when he signed his name, he simply receipted for the document [T. 96]. Although the prosecutor exclaimed before the jury that it was an "admission" [T. 95, the court, while properly ruling the document inadmissible [T. 97], failed to give any cautionary instruction to the jury regarding the matter. It is submitted that when the prosecutor attempts to introduce highly improper evidence, the court should, besides sustaining the objection thereto, admonish the jury to totally disregard the matter. *Robinson v. United States*, 32 F. 2d 505, 510. The general rule is that misconduct of the prosecutor is not grounds for reversal if the court promptly instructs the jury to disregard the matter. *Ammerman v. United States*, 185 Fed. 1. It would, therefore, follow that when the court fails to so instruct the jury, prejudicial error results to the defendant and the judgment should be reversed.

Specification of Error III.

The District Court erred in limiting the cross-examination of the prosecution's witness NORMAN H. WILSON relating to the issue of criminal intent of the appellant.

The Court was informed that the very gist of the defense was the appellant's physical and mental state at the time

of the alleged offense [T. 28]. The appellant testified that he had severe diarrhea attacks and bleeding through his stool [T. 71, 74], and that he had severe mental effects including performing senseless acts and loss of memory [T. 73].

The defense witness Glen Halverson, M.D., testified that a person having the symptoms testified to by the appellant might act reasonably normal, but at a later date be unable to recall or remember any actions that he did, or any events that transpired [T. 49 and 50]. Therefore, there was evidence that the appellant's physical condition was related to his mental condition.

The prosecution attacked appellant's contentions as to his condition [T. 85-91]. Yet the Court refused to allow the defense to cross-examine the prosecution's witness Wilson, the appellant's superior, who had seen the appellant shortly before the alleged offense [T. 25], on the subject of the defendant's physical and mental state [T. 28].

Evidence of the mental condition of the defendant at a given time is relevant to determination of mental condition at another time not unreasonably far removed, and it is proper to inquire as to the probability that as of the time of act charged, an accused's mental condition was the same as it was somewhat earlier. *Blunt v. United States*, 244 Fed. 355. Evidence as to accused's mental condition before an offense is admissible insofar as it is relevant to his condition at the time of the offense. *Lyles v. United States*, 254 Fed. 725. Great latitude is allowed in the admissions of evidence as relevant to the issue of insanity, particularly when the insanity is of a temporary nature or is interrupted by lucid intervals. *People v. Mallette*, 39 Cal. App. 2d 294, 102 P. 2d 1084; 1 *Wharton's*

Criminal Evidence, Section 213. Although the evidence must be directed to show defendant's mental condition at the time of the commission of the crime, it is relevant to show acts, conditions, and conduct of the accused both at the time of the offense and prior thereto, including statements made by the accused to others indicating an unsound mind.

1 *Wharton's Criminal Evidence*, Section 213.

It is submitted that the Court erred in restricting the cross-examination of the witness Wilson on the questions of appellant's mental or physical condition.

Specification of Error IV.

The District Court erred in not instructing the jury that the appellant's testimony is to be judged in the same way as that of any other witness.

It is a fundamental concept of our law that a defendant who takes the witness stand in his own behalf is entitled, at the outset, to have his testimony treated by the jury in the same manner as the testimony of other witnesses is treated. To place the defendant in another category would be tantamount to a denial of the presumption of innocence. The trial court in a criminal case is bound to instruct that the jury is the exclusive judge of the credibility of witnesses.

People v. Butterfield 40 Cal. App. 2d 725, 105 P. 2d 628.

So that the jury may appreciate the standards upon which they are to judge the testimony of the defendant, it is correct to instruct them that the defendant's testimony was to be measured according to the same standards as other witnesses.

People v. Ridgeway 89 Cal. App. 615, 265 Pac. 349.

Here the prosecutor specifically requested the Court to instruct the jury in reference to how they should judge his testimony [T. 106]. The record is totally void of any evidence that the Court gave the instruction requested by the government. The only instruction given in regard to credibility of witnesses is set forth on pages 104 and 105 of the transcript. When requested to do so, by either side, the Court is bound to instruct the jury in reference to the credit which should be given to the defendant's testimony.

People v. Rodundo, 44 Cal. 538, 117 Pac. 573.

There was no obligation on the part of defense counsel to join in the request or object to it. The Court failed and refused to give the instruction when the prosecutor asked for it, thus it would have been useless act for the defense to request it. The law does not require useless or idle acts.

Van Gammeren v. City of Fresno, 51 Cal. App. 2d 235, 124 P. 2d 621;

California Civil Code, *Maxims of Jurisprudence*, Section 3532.

Specification of Error V.

The record in this case is void of any competent proof that the letters appellant is charged with embezzling had been placed in the United States mail.

The indictment charges the appellant with embezzling three letters which had been entrusted to him and which had come into his possession intended to be conveyed by mail. None of these three letters were the so-called "test letters" deposited by the postal inspector. The only evidence that they were in the United States mail was the

rank hearsay testimony by the witness Lynch, a postal inspector, who testified as follows:

“I had nothing to do with those letters, and I never saw those letters prior to their recovery from Mr. Formhals. These are actual bona fide letters mailed by patrons of Hemet. There are four of them. I have since had correspondence with these people, and I have letters to the effect—as to their mailing.” [T. 33.]

Testimony of conversations with third persons is objectionable as hearsay and inadmissible.

United States v. Bourjaily, 167 F. 2d 993.

Hearsay evidence is incompetent to establish any specific fact which in its nature is susceptible of being proved by witnesses who speak from their own knowledge.

Hopt v. People of Utah, 110 U. S. 574.

While no objection was made to the admission of this evidence nor any motion made to strike the testimony, it is such obvious hearsay and goes to such a fundamental element of the prosecution's case, that a conviction on such evidence should not be permitted to stand.

See

Brown v. United States, 202 F. 2d 474.

Specification of Error VI.

The District Court erred in allowing Witness Lynch, over objection, to testify in regard to the cancellation time differences on the letters introduced into evidence and whether or not long and short letters would be together in the dispatch case at the Hemet Post Office when the witness admitted he was not familiar with the procedure at the Hemet Post Office.

Postal Inspector Lynch was examined as to the two so-called "test letters" which were deposited in the mail by him, neither of which was the basis of any count of the indictment against the appellant. He testified that the postmarks on the two letters were different. The record then indicates the following examination and testimony of this witness:

"Q. Based on your experience as a postal inspector, is it likely that those would have all been together?

Mr. Hupp: I object to this as—

The Witness: It is impossible.

Mr. Hupp: Just a minute. Don't answer the question while I am objecting, please.

I object to this as calling for a conclusion of the witness and ask that the answer be stricken.

The Court: The objection is overruled.

The Witness: These letters could not have been all as a unit of six, or even as a unit of less than six, because of five different representative mailing points in the city.

Mr. Osborne: I have no further questions." [T. 103].

The question obviously called for a conclusion of the witness. There was no qualification of this witness as an expert on procedure at the Hemet Branch Post Office, nor would this be a proper field for expert testimony. In fact, the record later discloses that the witness was unfamiliar with such procedures at Hemet [T. 104]. Testimony of a lay witness should be confined to concrete facts within his knowledge or observation.

Batsell v. United States, 217 F. 2d 257;

Zimberg v. United States, 142 F. 2d 132.

This improper evidence was directed at a most crucial ultimate fact, and the erroneous ruling was most prejudicial. The very crux of the defense was that the appellant had a repetition of a sick spell and went into the restroom with a handful of mail. [T. 76]. Through this improper evidence, the prosecution was evidently attempting to show that this handful of mail could not have been grouped as a unit.

Opinion evidence on a matter that is fully capable of proof and comprehension from available fact testimony is not admissible, particularly where such evidence is a plain expression of witness' opinion of defendant's guilt.

Wesson v. United States, 164 F. 2d 50.

The conclusion in this instance is particularly objectionable since the procedures at the Hemet Branch with reference to sorting, cancelling and handling of mail could easily have been disclosed. A witness' conclusion should not be admitted in evidence if facts underlying it may be easily stated so as to reproduce to the jury the factual conditions involved.

United States v. Schneiderman, 106 F. Supp. 892.

Conclusion.

Clear and obvious error was committed by the trial court in failing to make a judicial determination of the competency of the appellant to stand trial, and the matter must be remanded for further proceedings on this issue. As set forth above, we submit this error cannot be cured by any *ab initio* determination at this time of appellant's competency over eight months ago. A determination should be made of appellant's competency at this time, with appellant afforded an opportunity to submit evidence

on this question. If appellant is found competent, then a new trial must be ordered.

The Court also clearly erred in failing to instruct the jury on the credibility of appellant's testimony, and in not instructing the jury to totally disregard the administrative statement of charges which was claimed to be a confession. The other errors relating to the exclusion of proper evidence and the admission of improper evidence also would each warrant the reversal of the conviction. And, when these errors are considered cumulatively, justice dictates that the appellant be granted a new trial. We feel an examination of the record will leave this Court in grave doubt as to whether or not these errors had substantial influence in bringing about a verdict, and in such case the error should not be deemed harmless.

Krulewitch v. United States, 336 U. S. 440.

Particularly where counsel who tried the case was not self chosen, but appointed by the Court, the Appellate Court should carefully examine the record

Logan v. United States, 192 F. 2d 388.

We believe a careful examination of this record will convince this Court that the conviction should be reversed and the matter remanded for suitable proceedings on the competency of the appellant to stand trial at this time and appropriate disposition thereafter.

Respectfully submitted,

ANDERSON, ADAMS & BACON,

THOMAS E. KELLETT,

Attorneys for Appellant.

No. 16478

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DONALD W. FORMHALS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

LAUGHLIN E. WATERS,

United States Attorney,

ROBERT JOHN JENSEN,

Assistant United States Attorney,

Chief, Criminal Division,

WM. BRYAN OSBORNE,

Assistant United States Attorney,

600 Federal Building,

Los Angeles 12, California,

Attorneys for Appellee

United States of America.

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TOPICAL INDEX

PAGE

I.

Jurisdictional statement	1
--------------------------------	---

II.

Statutes involved	2
-------------------------	---

III.

Statement of the case and facts.....	2
--------------------------------------	---

IV.

Argument	3
----------------	---

Specification I. The District Court did not commit error by failing to make a determination as to appellant's competency to stand trial.....	3
--	---

Specification II. The District Court did not err in failing to admonish the jury to disregard the evidence offered by the prosecution in regard to a "statement of charges".....	9
--	---

Specification III. The District Court did not err in limiting the cross-examination of the prosecution witness Norman H. Wilson relating to the physical state of the appellant.....	10
--	----

Specification IV. The District Court committed no error in failing to give the instruction that the appellant's testimony is to be considered the same as that of any other witness....	12
---	----

Specification V. The evidence supports the finding that the letters appellant is charged with embezzling had been placed in the United States mails.....	13
--	----

Specification VI. The District Court did not err in allowing Postal Inspector Willard W. Lynch to testify as an expert on postal procedure.....	15
---	----

V.

Conclusion	16
------------------	----

TABLE OF AUTHORITIES CITED

CASES	PAGE
Aplin v. United States, 41 F. 2d 495.....	11
Bridgman v. United States, 183 F. 2d 750.....	11
Caminetti v. United States, 242 U. S. 470.....	13
Chevillard v. United States, 155 F. 2d 929.....	11, 14
Cohen v. Traveler's Insurance Co., 134 F. 2d 378.....	15
Contee v. United States, 215 F. 2d 324.....	7
Crutchfield v. United States, 142 F. 2d 170.....	10
Egan v. United States, 137 F. 2d 369, cert. den. 320 U. S. 788....	9
Gunther v. United States, 215 F. 2d 493.....	6, 7
Hagner v. United States, 285 U. S. 427.....	14
Hill v. United States, 261 F. 2d 483.....	10
Krupnicka v. United States, 254 F. 2d 213.....	5
Markham v. United States, 184 F. 2d 512.....	4
Mosca v. United States, 174 F. 2d 448.....	14
People v. Ridgway, 89 Cal. App. 615, 265 Pac. 349.....	12
Pine v. United States, 135 F. 2d 353, cert. den. 320 U. S. 740....	
.....	12, 13
Raffel v. United States, 271 U. S. 189.....	13
Smith v. United States, 259 F. 2d 125.....	8
Smith v. United States, 267 F. 2d 210.....	8
Sparf and Hanson v. United States, 156 U. S. 51.....	9
Taylor v. United States, 222 F. 2d 398.....	7
Tuchey v. Loew's Theater and Realty Corp., 149 F. 2d 677.....	15
United States v. Asgill, 602 F. 2d 776.....	11
United States v. Everett, 146 Fed. Supp. 54.....	6
United States v. Fontana, 231 F. 2d 807.....	11
United States v. Minuse, 142 F. 2d 388.....	11
Watson v. United States, 234 F. 2d 42.....	7
York v. United States, 241 Fed. 659.....	10

RULES	PAGE
Federal Rules of Criminal Procedure, Rule 28.....	3
Federal Rules of Criminal Procedure, Rule 29.....	14
Federal Rules of Criminal Procedure, Rule 30.....	12
Federal Rules of Criminal Procedure, Rule 52.....	7, 10

STATUTES	
Civil Code, Sec. 3532.....	12
United States Code, Title 18, Sec. 1709	1, 2
United States Code, Title 18, Sec. 3231.....	2
United States Code, Title 18, Sec. 4244	3, 4
United States Code, Title 18, Sec. 4245.....	8
United States Code, Title 28, Sec. 1291.....	2
United States Code, Title 28, Sec. 1294.....	2
United States Code, Title 28, Sec. 2255.....	8



No. 16478

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DONALD W. FORMHALS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

I.

JURISDICTIONAL STATEMENT.

On July 2, 1958, the Federal Grand Jury in and for the Southern District of California indicted the appellant in three counts for embezzling letters which had been intrusted to him and which had come into his possession intended to be conveyed by mail, in violation of Title 18, U. S. C., Section 1709 [C. Tr. 3].¹

Upon arraignment and a plea of not guilty appellant was tried by jury and convicted of each count of the indictment on February 19, 1959 [C. Tr. 7].

¹C. Tr. refers to the Clerk's Transcript of Record.

The sentence was imposed by the Court on March 9, 1959 [C. Tr. 8], under which the appellant was committed to the custody of the Attorney General for a period of six months on each count of the indictment, to run concurrently [C. Tr. 9].

The jurisdiction of the District Court is predicated upon Title 18, U. S. C., Section 3231, and Title 18, U. S. C., Section 1709. Jurisdiction of this Court rests pursuant to Title 28, U. S. C., Sections 1291 and 1294.

II.

STATUTES INVOLVED.

The indictment in this case was brought under Title 18, U. S. C., Section 1709, which provides in pertinent part as follows:

“Whoever, being a . . . Postal Service employee, embezzles any letter, . . . intrusted to him or which comes into his possession intended to be conveyed by mail . . . shall be fined not more than \$2,000 or imprisoned not more than five years, or both.”

III.

STATEMENT OF THE CASE AND FACTS.

The appellant's Statement of the Case and Statement of the Facts are not controverted and are incorporated herein by reference.

Where deemed necessary, a further development of the facts will be made in conjunction with the argument of the particular specification of error.

IV.
ARGUMENT.

SPECIFICATION I.

The District Court Did Not Commit Error by Failing to Make a Determination as to Appellant's Competency to Stand Trial.

On August 12, 1958, the appellee, in conjunction with counsel for the appellant, presented an oral motion to the District Court requesting that a psychiatrist be appointed to examine the appellant [C. Tr. 6]. Said motion was granted. However, an order appointing a psychiatrist was not executed by the Court until February 4, 1959, due to the hospitalization of the appellant during the intervening period [C. Tr. 72, 73]. The order of February 4, 1959, directed that Dr. Edwin E. McNeil, a psychiatrist, examine the appellant on or before February 13, 1959, and submit a written report of his examination to the Court, with copies thereof to the respective attorneys for the appellant and appellee. The order further directed Dr. McNeil to make inquiry into the present competency of the defendant with specific reference to his ability to presently defend himself, or to assist his counsel in the preparation and presentation of his defense,¹ and, as to defendant's mental condition at the time of the commission of the alleged defense.² Subsequent thereto, on February 19, 1959, the District Court ordered the report of Dr. McNeil filed [C. Tr. 22].

¹Pursuant to Title 18 U. S. C. Section 4244.

²Pursuant to Rule 28 of the Federal Rules of Criminal Procedure.

The appellee admits that no judicial determination was made of the competency of the appellant to stand trial. It is submitted, however, that in view of the conclusion Dr. McNiel, “. . . it is my opinion that he is able to presently defend himself and assist his counsel in the preparation and presentation of his defense . . .”, that the appellant had no right to a hearing or a judicial determination of his present competency to stand trial.

Title 18, U. S. C., Section 4244, provides in pertinent part that “. . . if the report of the psychiatrist indicates a state of present insanity or such mental incompetency in the accused, the Court shall hold a hearing, . . .” Conspicuously absent from the statute is any requirement for a hearing, or for a judicial determination, following a report by the examining psychiatrist that the accused is presently competent to stand trial.

The only decision found dealing specifically with the point in question is *Markham v. United States*, 184 F. 2d 512 (4th Cir., 1950). In a *per curiam* decision the Court stated:

“[1, 2] It appears that on November 9, 1949, counsel for appellant moved that he be committed to an institution to be examined by competent psychiatrists for the purpose of determining his sanity. The United States Attorney joined in the motion and an order to that effect was accordingly entered. Appellant was committed to Saint Elizabeth's Hospital, Washington, D. C. for examination and the period of examination was extended at the suggestion of the superintendent of that institution in order that a thorough examination might be had. After an examination extending from November 14, 1949 to

January 26, 1950, the superintendent of Saint Elizabeth's and another psychiatrist joined in a report finding that appellant was not insane at the time and was competent to consult with counsel in the preparation of his defense. Since it did not appear from the report of the psychiatrists that appellant was insane, it was not required by the statute that the court hold a hearing as to his mental condition at the time. Nevertheless, the trial judge made inquiry whether appellant desired a further hearing in the matter, and, being advised by his counsel that he did not, proceeded to find as a fact that appellant was competent to stand trial. It is true that appellant and his counsel thereafter stated in open court that they waived a hearing on insanity at that time; but this was a mere matter of supererogation. No such waiver was required to enable the court to proceed with the arraignment and trial after the examining physicians had reported appellant sane, especially as the court had been advised that no further hearing was desired on the matter and had made a finding of sanity based on their report.

"There was no error and the judgment and sentence appealed from will be affirmed.

"Affirmed."

By way of *obiter dictum*, *Krupnicka v. United States*, 254 F. 2d 213 (8th Cir., 1959), stated:

"... the fact that a situation may be one imposing the duty upon the Court to have a psychiatric examination made does not necessarily mean, however, that the Court is likewise compelled to hold a hearing and make a finding as to the accused's mental competency. The language of Section 4244 as to the

requirement for a hearing is that, 'if the report of the psychiatrist indicates a state of present insanity or such mental incompetency in the accused (as to be unable to understand the proceedings against him or properly to assist in his own defense), the Court shall hold a hearing, upon due notice, at which evidence as to the mental condition of the accused may be submitted, including that of the reporting psychiatrist, and made a finding with respect thereto'".

Again, by way of *obiter dictum* in *United States v. Everett*, 146 Fed. Supp. 54 (D. C. Kan., 1956), stated,

"the only hearing contemplated as to a defendant's mental competency, other than a full and complete hearing at the trial of the criminal action, is if the report of the psychiatrist 'indicates a state of present insanity or . . . mental incompetency . . .', then a hearing is to be had as provided in the act. . . . The legislation, in the studied judgment of this Court, should be applied precisely as written."

The appellant, in attempting to read into the statute a requirement for a hearing where the accused is found competent by the examining psychiatrist, cites the case of *Gunther v. United States*, 215 F. 2d 493 (District of Columbia Cir., 1954). The specific holding of the *Gunther* decision is that where the accused had been committed to a mental hospital as being mentally incompetent to stand trial, the District Court subsequently erred in trying the accused after the superintendent of the mental hospital had issued a certificate that the accused had recovered his reason, without the District Court making a judicial determination of the present competency of the accused to stand trial. Circuit Judge Bazelon specifically noted in footnote No. 9, "such a hearing is required by the

statute only where there has been a psychiatric finding of present incompetency.” Thus the *Gunther* case engrafted upon the statute the requirement that a judicial determination must be made that the accused had regained his competency to stand trial subsequent to an earlier judicial determination that the accused was not competent to stand trial. This extension of the statutory rule has been approved in *Contee v. United States*, 215 F. 2d 324 (1954), and *Taylor v. United States*, 222 F. 2d 398 (1955).

The appellant also cites the case of *Watson v. United States*, 234 F. 2d 42 (District of Columbia Cir., 1956). The *Watson* decision reversed a conviction of murder upon the grounds that illegally obtained evidence had been used by the prosecution to acquire the conviction. Watson had been examined by a psychiatrist subsequent to his arrest and found competent to stand trial. However, no judicial determination of his competency to stand trial had been made. By way of *obiter dictum* Circuit Judge Danaher stated “Still, on a new trial, there should be a determination of the competency, to be noted of record, pursuant to the statute”, citing the *Gunther* decision alone as authority for that proposition. It is submitted that Judge Danaher overlooked footnote No. 9 to the *Gunther* decision.

It should be noted that appellant questions the failure of the Court to make a determination of his competency to stand trial for the first time at the appellate level. Even, assuming *arguendo*, that error had been committed of sufficient seriousness to invoke the “plain error” rule set forth in Rule 52 of the Federal Rules of Criminal Procedure, the appellant should not be entitled to a reversal of his conviction. The remedy invoked in the *Gunther*

decision was to remand the case to the District Court with directions to determine, in a hearing, whether the appellant was competent to stand trial when he was tried and sentenced. And, if found to have been incompetent, to vacate the conviction and order a new trial, otherwise, the conviction was to stand. It should also be noted that Title 18, U. S. C., Section 4245, entitled, "Mental incompetency undisclosed at trial",³ provides for an administrative remedy which disturbs the conviction only in the event the appellant is found to have been incompetent to stand trial.

It has also been established that Title 28, U. S. C., Section 2255 is available to test the question of the appellant's competency to stand trial.

Smith v. United States, 259 F. 2d 125 (9th Cir., 1958);

Smith v. United States, 267 F. 2d 210 (9th Cir., 1959).

³"§4245. Mental incompetency disclosed at trial.

"Whenever the Director of the Bureau of Prisons shall certify that a person convicted of an offense against the United States has been examined by the board of examiners referred to in title 18, United States Code, section 4241, and that there is probable cause to believe that such person was mentally incompetent at the time of his trial, provided the issue of mental competency was not raised and determined before or during said trial, the Attorney General shall transmit the report of the board of examiners and the certificate of the Director of the Bureau of Prisons to the clerk of the district court wherein the conviction was had. Whereupon the court shall hold a hearing to determine the mental competency of the accused in accordance with the provisions of section 4244 above, and with all the powers therein granted. In such hearing the certificate of the Director of the Bureau of Prisons shall be prima facie evidence of the facts and conclusions certified therein. If the court shall find that the accused was mentally incompetent at the time of his trial, the court shall vacate the judgment of conviction and grant a new trial. Added Sept. 7, 1949, c. 535, §1, 63 Stat. 686."

SPECIFICATION II.

The District Court Did Not Err in Failing to Admonish the Jury to Disregard the Evidence Offered by the Prosecution in Regard to a "Statement of Charges."

During cross-examination, the appellant admitted that he had received a "statement of charges" on June 25, 1958 [C. Tr. 94] and that upon receiving it, he did not deny the charges made against him as set forth therein [R. Tr. 93]. It is submitted that being presented with a statement of charges which accuses the recipient of committing a felony could rationally be expected to elicit a denial from an innocent person. The failure so to deny the charges is a matter which can be put before the jury as equivalent to an admission of guilt. Such adoptive admissions have long been recognized as an exception to the rule against hearsay.

Sparf and Hanson v. United States, 156 U. S. 51, 56 (1895);

Egan v. United States, 137 F. 2d 369 (8th Cir., 1943), cert. den. 320 U. S. 788.

The appellant on direct examination had testified that his confession [Ex. 1] was the result of coercion and emotional disturbance [C. Tr. 82-84]. The subsequent admission here complained of, received approximately six hours after signing the confession [C. Tr. 43, 98], appears relevant to impeach the appellant and corroborate the confession. The District Court, however, sustained the appellant's objection to the admission into evidence of the "statement of charges". It is submitted that the evidence could properly have been received into evidence and that therefore no prejudice resulted to the appellant

by the failure of the Court, *sua sponte*, to admonish the jury to disregard the matter.

Further, the fact that the appellant did not request the Court to admonish the jury to disregard the matter [C. Tr. 97] precludes the matter from being considered for the first time on appeal, unless it can be said that "plain error" resulted.

Crutchfield v. United States, 142 F. 2d 170 (9th Cir., 1943);

Hill v. United States, 261 F. 2d 483 (9th Cir., 1958);

York v. United States, 241 Fed. 659 (9th Cir., 1916);

Federal Rules of Criminal Procedure, Rule 52.

In view of the eyewitness testimony of postal inspector Williard W. Lynch [C. Tr. 28-45] and the full and complete confession of the appellant [Ex. 1], the prejudicial effects, if any, of the offer of the "statement of charges" would appear to fall far short of "plain error."

SPECIFICATION III.

The District Court Did Not Err in Limiting the Cross-Examination of the Prosecution Witness Norman H. Wilson Relating to the Physical State of the Appellant.

It is asserted that the District Court committed reversible error by limiting the cross-examination of the prosecution witness Norman H. Wilson relating to the appellant's "physical state." A reading of the testimony of Mr. Wilson on direct examination [C. Tr. 24-26] will suffice to show that the physical state of the appellant was beyond the scope of the direct examination and thus,

under the Federal Rule, not a proper subject for cross-examination.

Chevillard v. United States, 155 F. 2d 929 (9th Cir., 1946);

Aplin v. United States, 41 F. 2d 495 (9th Cir., 1930);

United States v. Minuse, 142 F. 2d 388, 389 (2d Cir., 1944).

Where the appellant wishes to develop defensive matters from a prosecution witness he should call that witness as his own, unless the matter has been covered during the direct examination.

Bridgman v. United States, 183 F. 2d 750, 758 (9th Cir., 1950).

“ . . . the idea that lies at the bottom of all cross-examination [is] . . . that it is designed, not only to develop the facts of the case, but to test the witness in matters of recollection, of prejudice or bias, and of truthful statement.”

United States v. Fontana, 231 F. 2d 807, 811 (3rd Cir., 1956), citing *United States v. Asgill*, 602 F. 2d 776, 779 (4th Cir., 1932).

It is submitted that the District Court did not err in refusing to allow the appellant to develop defensive matters from a prosecution witness in that the matter was beyond the scope of direct examination, and that, as the appellant did not avail himself of the opportunity to call Mr. Wilson as his own witness, no error can be assigned to the District Court's limitation of the cross-examination of Mr. Wilson.

SPECIFICATION IV.

The District Court Committed No Error in Failing to Give the Instruction That the Appellant's Testimony Is to Be Considered the Same as That of Any Other Witness.

Appellant cites: "The law neither does nor requires idle acts."

Cal. Civ. Code, Sec. 3532.

This section unquestionably states an admirable principle of law. It is submitted, however, that this maxim, relied upon by the appellant, in no way derogates the requirement of Rule 30 of the Federal Rules of Criminal Procedure that "No party may assign as error any portion of the charge or omission therefrom, unless *he* objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection" (emphasis supplied). The record discloses no compliance with the stated rule by the appellant [C. Tr. 105-106].

The case of *People v. Ridgway*, 89 Cal. App. 615, 265 Pac. 349, relied upon by the appellant, does state that the subject instruction is correct in law, but also states that no error should result from a refusal of the court to give the instruction.

In the case of *Pine v. United States*, 135 F. 2d 353 (5th Cir., 1943), cert. den., 320 U. S. 740, the following test was set forth:

"In short, the refusal as to any of them may be regarded as reversible error if, but only if, (1) it is in itself a correct charge, (2) it is not substantially covered in the main charge, and (3) it is on

such a vital point in the case that the failure to give it deprived defendant of a defense or seriously impaired its effective presentation.”

While the subject instruction meets the first requirement, *Raffel v. United States*, 271 U. S. 189 (1943); *Caminetti v. United States*, 242 U. S. 470 (1917),

the instruction given by the court [C. Tr. 104-105] sufficiently instructed the jury in regard to the credibility of witnesses so as to defeat the second requirement of the *Pine* case. In respect to the third requirement of the *Pine* case, the appellant has not pointed out wherein the failure to give the subject instruction deprived the defendant of his defense or worked to his prejudice. Thus, the appellant does not show himself to be entitled to the requested relief.

SPECIFICATION V.

The Evidence Supports the Finding That the Letters Appellant Is Charged With Embezzling Had Been Placed in the United States Mails.

Apart from the questioned testimony of Mr. Lynch, the following testimony supports the finding of the jury that the letters appellant is charged with embezzling had been placed in the United States mail for delivery: The appellant admitted that he was engaged in the sorting of mail at the Hemet, California, Post Office [C. Tr. 75], and that he took a handful of mail into the men's room of the post office [C. Tr. 76]. The letters were being processed through a United States post office [C. Tr. 24-26, 33-35]. They bear post marks and stamp cancellations [Exs. 2A through 2F].

It is submitted that, in the absence of contradicting evidence, the jury was entitled to infer from all the above that the letters in question had been placed for delivery in the United States mail.

Further, appellant is not entitled to question the sufficiency of the evidence in this court, having provided this court with only a partial transcript of the proceedings below. It is well settled that to challenge the sufficiency of the evidence on appeal the entire record must be before the Appellate Court.

Chevillard v. United States, 155 F. 2d 929, 936 (9th Cir., 1946).

Without the entire record the Appellate Court is entitled to assume that the evidence is sufficient to sustain conviction.

Hagner v. United States, 285 U. S. 427 (1932).

Further, appellant is not entitled to challenge the sufficiency of the evidence in that he failed to make any motion for a judgment of acquittal as provided for by Rule 29 of the Federal Rules of Criminal Procedure. It is well settled that this failure will preclude a review of the sufficiency of the evidence by an Appeal Court.

Mosca v. United States, 174 F. 2d 448, 451 (9th Cir., 1949).

It should also be noted that this specification of error, as others discussed earlier herein, is asserted for the first time at the appellate level, and therefore is not grounds for appellate relief.

SPECIFICATION. VI.

The District Court Did Not Err in Allowing Postal Inspector Willard W. Lynch to Testify as an Expert on Postal Procedure.

Appellant contends that Postal Inspector Lynch was not qualified to testify as an expert on postal procedures. The District Court concluded that Mr. Lynch was so qualified. Mr. Lynch had testified that he had been a postal employee for 22 years and a postal inspector for 11 years [C. Tr. 29], and that he was charged with the duty of investigating losses of mail at the Hemet, California, post office [C. Tr. 29, 30].

The qualifications of an expert witness is a matter for the trial judge's discretion, reversible only for abuse.

Tuchey v. Loew's Theater and Realty Corp., 149 F. 2d 677, 679 (2d Cir., 1945);

Cohen v. Traveler's Insurance Co., 134 F. 2d 378 (7th Cir., 1943).

It is submitted that no abuse of discretion was committed by the District Court in allowing Mr. Lynch to state an opinion based upon his particular knowledge as a postal inspector. The statement of Mr. Lynch that, "I can't say exactly at Hemet. They should not have been" [C. Tr. 104] goes to the question of the weight to be given his testimony rather than his qualification as an expert on postal procedures.

Although appellant cites a correct rule of law: "A witness' conclusion should not be admitted in evidence if facts underlying it may be *easily* stated so as to reproduce to the jury the factual conditions involved" (emphasis supplied) it has doubtful applicability here. It should be noted that the questioned testimony was elicited

during rebuttal examination [R. Tr. 97] pertinent to the testimony of the appellant that he had innocently carried the letters into the men's room [R. Tr. 76]. The facts necessary to entitle the jury to reach a contrary conclusion, stated by Mr. Lynch as an expert, would necessarily have to include a complete explanation of the various postal routes affected, the mail collection procedure, and the mail sorting and distribution procedure at the Hemet, California, post office. Under these circumstances and as a matter of rebuttal, it is submitted that the Court did not abuse its discretion by allowing the "easier" means of proof.

V.

CONCLUSION.

1. A judicial determination of the competency of the appellant to stand trial was not required in the instant case.

2. No error occurred during the attempted introduction into evidence of the "statement of charges" which required the Court to admonish the jury to disregard the matter.

3. The questions relating to the "physical state" of the appellant were defensive matters, beyond the scope of direct examination, and thus properly denied on cross-examination of Norman H. Wilson.

4. The District Court adequately instructed the jury in regard to the credibility of witnesses.

5. The evidence supports the finding that the letters appellant is charged with embezzling had been placed for delivery in the United States mail.

6. The District Court did not abuse its discretion in allowing the Postal Inspector to testify as an expert on postal procedures.

7. Specifications of error I, II, IV and V were not raised in the District Court, and should not be heard for the first time at the appellate level.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

ROBERT JOHN JENSEN,
*Assistant United States Attorney,
Chief, Criminal Division,*

WM. BRYAN OSBORNE,
*Assistant United States Attorney,
Attorneys for Appellee
United States of America.*



No. 16,479 ✓

**United States Court of Appeals
For the Ninth Circuit**

FRANK FILICE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

**On Appeal from the United States District Court
for the Northern District of California.**

BRIEF OF APPELLEE.

LYNN J. GILLARD,

United States Attorney,

FREDERICK J. WOELFLEN,

Assistant United States Attorney,

422 Post Office Building,

7th and Mission Streets,

San Francisco 1, California,

Attorneys for Appellee.

FILED

JUL 27 1959

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Subject Index

	Page
Jurisdiction	1
Statement of the case	1
Argument	5
Conclusion	9

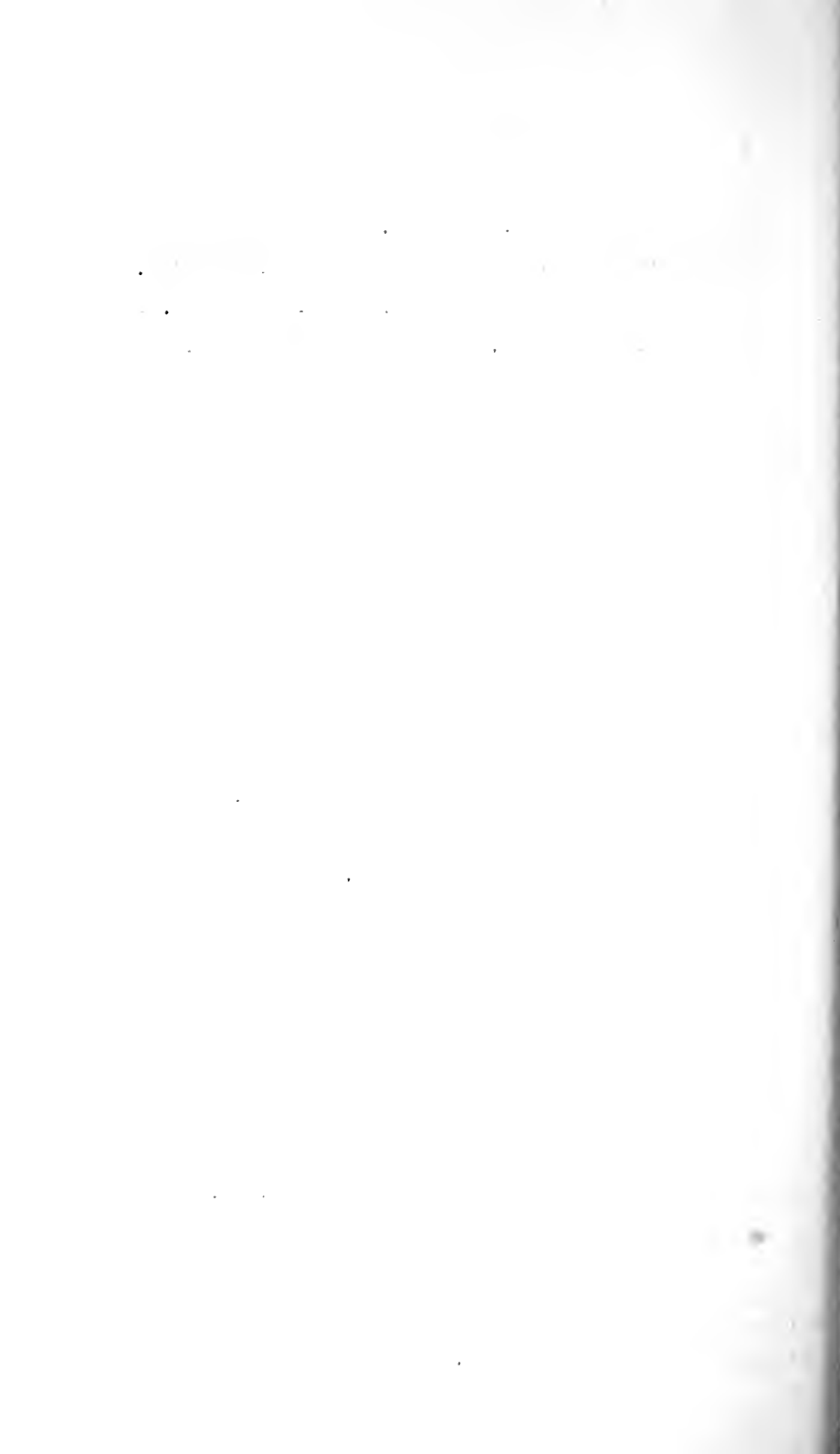
Table of Authorities Cited

Cases	Pages
Dillard v. McKnight, 39 Cal. 2d 209	8
Miller v. Spokane International R. Co., 293 Fed. 748	6
Panos v. Great Western Packing Co., 21 Cal. 2d 636	7, 8
Todhunter v. Smith, 219 Cal. 690, 695	9
Wellman v. Security First National Bank, 108 Cal. App. 2d 254, 265	9

Codes	
California Code of Civil Procedure, Section 1908(2)	7
28 United States Code:	
Section 1291	1
Section 1346(b)	7

Rules	
Federal Rules of Civil Procedure, Rule 73	1

Texts	
Freeman on Judgments, 5th Edition, Sections 598 and 599	9
64 ALR 663	9
69 ALR 1004	9



No. 16,479

United States Court of Appeals For the Ninth Circuit

FRANK FILICE,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court
for the Northern District of California.

BRIEF OF APPELLEE.

JURISDICTION.

This court has jurisdiction of this appeal by reason of Title 28, United States Code, Section 1291 and Rule 73 of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE.

This is an appeal from an order of the United States District Court for the Northern District of California made and entered on March 30, 1959, dismissing with prejudice appellant's "Complaint for Damages from Date of Trial." The complaint was

dismissed because it showed on its face that the cause of action for which relief was sought had been adjudicated in a prior lawsuit by a money judgment in favor of the appellant.

Appellant's brief pages 5 to 7 refers to certain judicial proceedings that occurred in the year 1952 in Civil Action No. 30854 of the United States District Court for the Northern District of California. This earlier action was instituted under the Federal Tort Claims Act for personal injuries sustained by the plaintiff. In Civil Action No. 30854 of the United States District Court for the Northern District of California appellant received judgment of \$15,000 against the United States of America, the appellee here. This judgment was entered on June 12, 1952.

The complaint which is the subject of this appeal was filed in Civil Action No. 34505 of the United States District Court for the Northern District of California which was originally instituted on March 11, 1955. The pleading which is the sole subject of this appeal was the last of several proceedings initiated by the appellant in an attempt to secure further and additional damages for the injuries for which he was awarded \$15,000 on June 12, 1952, in Civil Action No. 30854.*

Excerpts of the docket entries revealed that the second proceeding was initiated by the appellant approx-

*For the purpose of clarity and distinction, the appellee will hereafter refer to Civil Action No. 30854 which resulted in the \$15,000 judgment as the first proceeding, and Civil Action No. 34505 initiated on March 11, 1955, as the second proceeding.

imately 33 months after he secured his \$15,000 in the first proceeding. In his second proceeding appellant sought to have the \$15,000 awarded to him in the first proceeding set aside for the reason that it was secured by fraud. This purported fraud consisted of appellant's medical expert Dr. W. Henry Harper's giving alleged perjurious testimony at the time of trial of the first proceeding as to the full nature, extent and permanency of Mr. Filice's personal injuries.

In his second proceeding the appellant contended that the so-called fraud that purportedly occurred during the trial of the first proceeding prevented the court from being fully advised as to the exact extent of his injuries and thus resulted in his being awarded damages that were inadequate and not commensurate with his physical disabilities.

The records in the first proceeding will disclose that this so-called charge of fraud, perjury or misrepresentation, however characterized, was brought to the attention of the trial judge through appellant's motion to vacate the judgment of June 12, 1952, which was filed in the first proceeding on August 1, 1952. This motion was denied by the trial judge. The records in the first proceeding show that prior to the inception of the second proceeding a certificate of settlement from the General Accounting Office dated March 31, 1953, bearing claim No. Z 1353876 was issued indicating the payment to the appellant of the \$15,000 judgment of June 12, 1952.

After initiating the second proceeding seeking to set aside the judgment of the first proceeding on the

grounds that it was procured by fraud, the United States of America, the appellee here, moved to dismiss the complaint or in the alternative for a more definite statement. Appellee's motion to dismiss was denied on July 5, 1952, but its motion for a more definite statement was granted. Thereafter on August 7, 1955, appellant filed an amended complaint again seeking to set aside the judgment in the first proceeding on the same grounds that it was secured by fraudulent testimony. Appellee for the second time moved to dismiss the amended complaint which motion was granted on October 3, 1956; an order of dismissal was entered on that day. Appellant never appealed the court's order of October 3, 1956, dismissing his complaint. Further no appeals except the instant appeal have ever been initiated by the appellant with respect to any proceeding, orders or judgment entered in the first or second proceedings.

Following the dismissal of the complaint to set aside the judgment of the first proceeding the appellant did nothing until September 19, 1957, when he filed the complaint which is in issue in this appeal. Service of this pleading was not effected upon the appellee until December 22, 1958, 14 months after the complaint was filed with the Clerk of the United States District Court for the Northern District of California. After service upon the United States of America of the appellant's so-called "Complaint for Damages from Date of Trial" a motion to dismiss was filed by appellee which was argued on March 2 and 4, 1959. United States District Judge George B.

Harris granted the government's motion to dismiss on March 30, 1959. This is the order which is now being appealed.

ARGUMENT.

Despite appellant's uncorroborated charges of irregularities during the trial of the first action, the only issue to be determined by this appellate tribunal is the propriety of the District Court's order of March 30, 1959, dismissing with prejudice the appellant's "Complaint for Damages from Date of Trial."

Appellant in his brief devotes a majority of his argument and so-called specifications of errors to the perjurious and fraudulent testimony given at the trial of the first proceeding, to collusion and conspiracy between his counsel and government attorneys in precluding the doctor from making a full disclosure of appellant's injuries at the time of trial of the first proceeding and so-called falsification of a trial transcript by an official certified court reporter of the United States District Court for the Northern District of California.

A review of the records of the two proceedings will readily disclose that all of these charges have long since been adjudicated by the United States District Court for the Northern District of California. The allegations of fraud, conspiracy and falsification of the trial transcript were before the trial judge in the first proceeding on appellant's motion to vacate the judgment which was heard on August 12, 1952. The

motion was denied. Again in the second proceeding these charges were brought to fore in the plaintiff's complaint and amended complaint to set aside the judgment in the first proceedings. This complaint was dismissed with prejudice by the United States District Court on October 3, 1956. As already mentioned, no appeals were ever taken from these two orders and the question raised in those proceedings are now moot and not subject to consideration or review in this appeal.

A review of the docket entries in both the first and second proceedings and the allegations in the "Complaint for Damages from Date of Trial" indisputedly disclose the correctness of Judge Harris' order of March 30, 1959. It is beyond question that the purpose and purport of the appellant's complaint was an attempt on the part of Mr. Filice to secure additional and further damages for the injuries which he had been previously compensated by a \$15,000 judgment in June, 1952.

As a matter of law the District Court was correct in its order of March 30, 1959, in holding that this "pleading" stated a cause of action that had heretofore been adjudicated. The law on this subject is well established. A litigant can have only one recovery for one wrong suffered. The appellant has had his day in court and has been compensated.

In urging affirmance, the appellee relies particularly upon this court's decision in *Miller v. Spokane International R. Co.*, 293 Fed. 748, 750, wherein it was held:

“Where there is a single tort and an entire claim is interposed to recover damages for the tort, all the various items which are relied upon to sustain the allegations of damages * * * must be included in an action in which the injured person seeks to recover. * * * and all the damages which result from a single tort form an indivisible cause of action.”

With respect to the legal principle in issue in this appeal attention is directed to the California Code of Civil Procedure, Section 1908(2) which is applicable in this instance as this case was instituted under the Federal Tort Claims Act for an accident which occurred in the State of California (28 U.S.C. 1346(b)). Section 1908(2) states:

“The effect of a judgment or final order in an action or special proceeding before a court or judge of this state, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows:

“In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action or proceeding.”

The California Supreme Court in *Panos v. Great Western Packing Co.*, 21 C. 2d 636, enunciated the well established principle that a prior judgment in a

tort action operates as a bar to a second action on the same incident and the prior judgment concludes not only every matter which was but also every matter which might have been urged in support of the initial claim. This ruling was based upon the doctrine of *res judicata*.

In the *Panos* case, the California Supreme Court states:

“The doctrine of *res judicata* rests upon the ground that the party to be affected, or some other with whom he is in privity, has litigated, or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of his opponent. Public policy and the interest of litigants alike require that there be an end to litigation. In applying the doctrine the cases recognize a distinction between the effect of a judgment operating by way of estoppel in a later action upon a different cause of action and one operating by way of bar against a second action upon the same cause of action.

Dillard v. McKnight, 39 Cal. 2d 209, held:

“It rests upon the sound public policy that there must be an end of litigation and accordingly, persons who have had one fair trial on an issue may not again have it adjudicated. * * * So it is stated as ‘an elementary principle, recognized by [our] code [Code Civ. Proc., Sec. 1908, Subd. 2], that a judgment or order is operative not only upon parties but to the same extent upon their privies.’ ”

See also,

Wellman v. Security First National Bank, 108

Cal. App. 2d 254, 265;

Todhunter v. Smith, 219 Cal. 690, 695;

Freeman on Judgments, 5th Edition, Sections
598 and 599;

69 ALR 1004;

64 ALR 663.

CONCLUSION.

Appellee respectfully submits from the law cited herein and from the factual history of the two proceedings as set forth in the docket entries the pleading and orders that constitute the transcript of record in this appeal, this appellate proceeding is without merit; that the District Court by its order of March 30, 1959, did not err in entering a dismissal with prejudice of plaintiff's "Complaint for Damages from Date of Trial" and that order should be affirmed by this court.

Dated, San Francisco, California,

July 20, 1959.

Respectfully submitted,

LYNN J. GILLARD,

United States Attorney,

FREDERICK J. WOELFLEN,

Assistant United States Attorney,

Attorneys for Appellee.

No. 16483

Set Also

3113

United States
Court of Appeals
for the Ninth Circuit

ROBERT L. HARGRAVE,

Appellant,

vs.

E. G. WELLMAN, doing business as Wellman
Enterprises,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Montana

FILED

AUG - 4 1959

PAUL P. O'BRIEN, CLERK



No. 16483

United States
Court of Appeals
for the Ninth Circuit

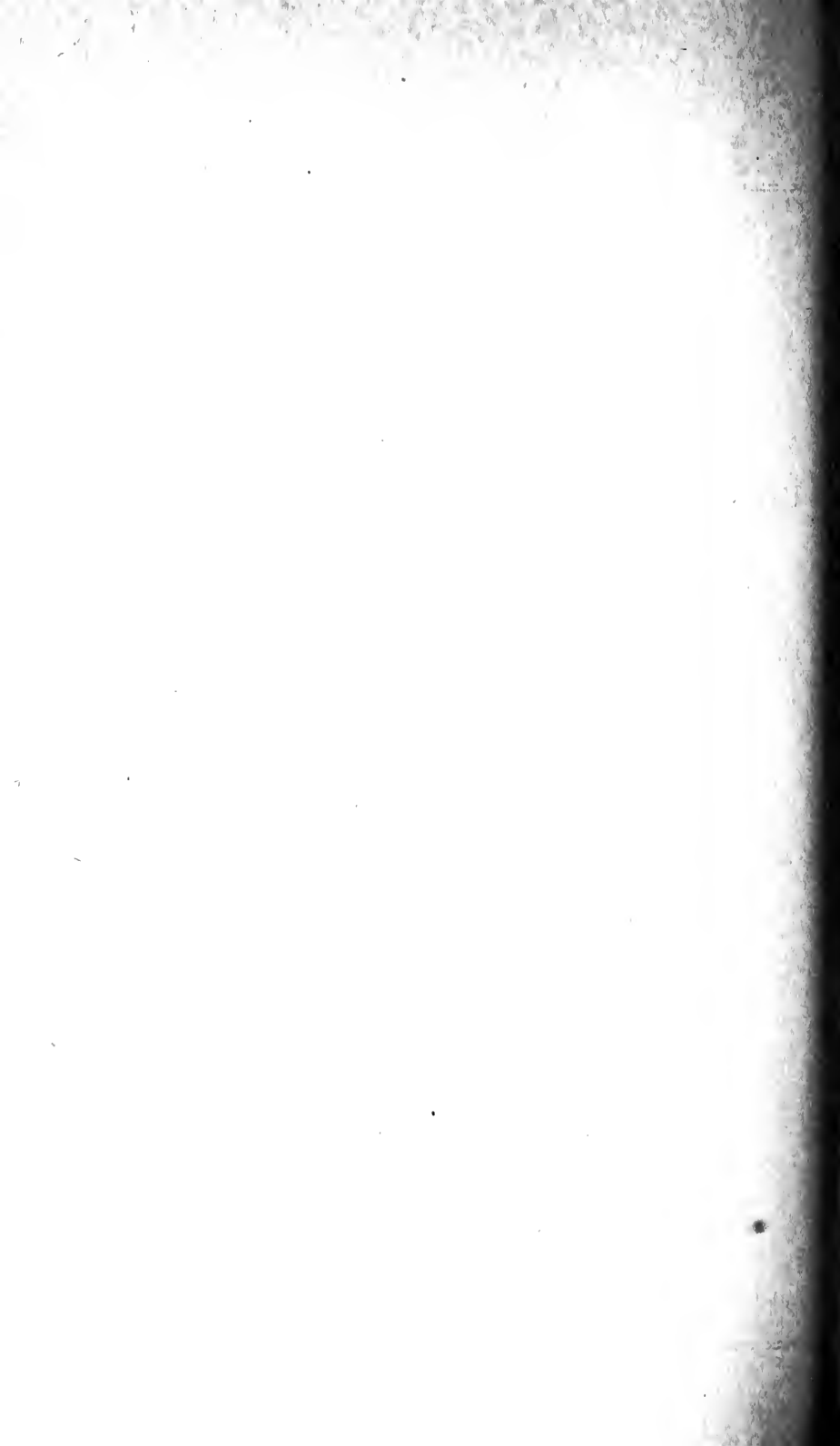
ROBERT L. HARGRAVE, Appellant,

vs.

E. G. WELLMAN, doing business as Wellman
Enterprises, Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Montana



INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer to Complaint.....	8
Appeal:	
Certificate of Clerk to Transcript of Record on	22
Cost Bond on.....	21
Notice of	20
Statement of Points and Designation of Record on (USCA).....	328
Certificate of Clerk to Transcript of Record...	22
Complaint	3
Cost Bond on Appeal.....	21
Instructions Requested by Plaintiff.....	11
Judgment	19
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	20
Statement of Points and Designation of Record (USCA)	328
Transcript of Proceedings and Testimony.....	25
Exceptions to Instructions.....	326

Transcript of Proceedings—(Continued):

Instructions to the Jury..... 308

Witnesses For Defendant:

Dillon, Virgil T.

—direct (Blewett) 292

Higgins, John C.

—direct (Blewett) 296

—cross (Kouri) 302

Richardson, Dr. Russell

—direct (Blewett) 262

—cross (Kouri) 278

—redirect (Blewett) 291

—recross (Kouri) 292

Witnesses For Plaintiff:

Dillon, Virgil T.

—direct (Kouri) 46

—cross (Blewett) 76

Hargrave, Ann

—direct (Kouri) 186

—cross (Blewett) 209

Hargrave, Dr. Robert L.

—direct (Kouri)77, 104, 110

—voir dire (Blewett)..... 103

—cross (Blewett)133, 136, 157

—redirect (Kouri)158, 174

—recross (Blewett)167, 176

Transcript of Proceedings—(Continued):

Witnesses For Plaintiff—(Continued):

Hargrave, Mrs. Robert

—direct (Kouri) 248

—cross (Blewett) 261

Ryan, Mrs. R. G. (Deposition)

—direct (Kouri) 178

Van Deventer, Dr. Loyd R. (Deposition)

—direct (Kouri) 217

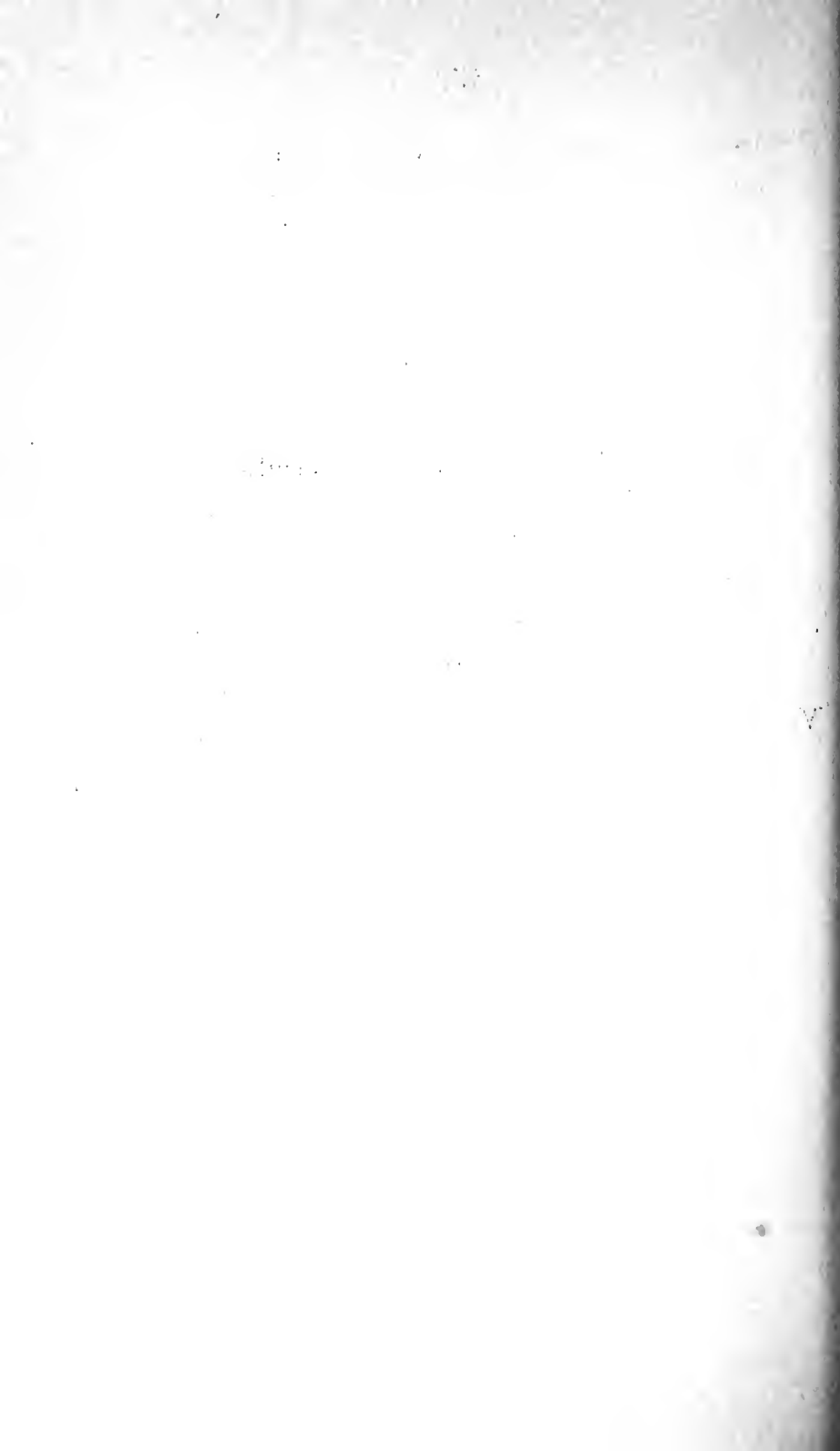
—cross (Blewett) 234

Wellman, E. G.

—direct (Bretz) 26, 36

—voir dire (Blewett)..... 35

Verdict 18



NAMES AND ADDRESSES OF ATTORNEYS

McCABE, McCABE AND BRETZ,
24 - 4th Street North,
Great Falls, Montana,

KOURI AND BANNER,
927 Oil and Gas Building,
Wichita Falls, Texas,

Attorneys for the Plaintiff-Appellant.

JARDINE, STEPHENSON, BLEWETT &
WEAVER, AND GEORGE McCABE,
410 First National Bank Building,
Great Falls, Montana,

Attorneys for the Defendant-Appellee.



In the United States District Court, District
of Montana, Great Falls Division

Civil Action No. 1917

DR. ROBERT L. HARGRAVE, Plaintiff,

vs.

E. G. WELLMAN, D/B/A WELLMAN ENTER-
PRISES, and VIRGIL DILLON,
Defendants.

COMPLAINT

To the Honorable Judge of Said Court:

Now comes Dr. Robert L. Hargrave, M.D., hereinafter styled Plaintiff, complaining of E. G. Wellman, d/b/a Wellman Enterprises, and Virgil Dillon, hereinafter styled Defendants, and for cause of action would respectfully show the Court as follows:

I.

That the Plaintiff is a citizen and resident of Wichita County, Texas.

II.

That the Defendants are citizens and residents of East Glacier Park, Montana, where they may be served with service of process.

III.

That there is a diversity of citizenship between the parties hereto and the amount in controversy

exceeds the amount of \$3,000.00. Wherefore, this Honorable Court has jurisdiction of this cause.

IV.

That on or about June 23, 1956, and prior thereto, the Defendant, E. G. Wellman, d/b/a Wellman Enterprises, was and is still engaged in the business of operating a riding horse concession at the Many Glacier Hotel in Glacier National Park, Montana; with the Defendant, Virgil Dillon, a seasoned horse expert, in charge of said stables.

V.

That on or about the 23rd day of June, 1956, the Plaintiff, Dr. Robert L. Hargrave, in the company of his young daughter, Ann, had rented some horses from the riding stables which were owned and operated by the Defendant, E. G. Wellman, and rode said horses to a lake. That on the return trip and on the way to the stables, the horse on which your Plaintiff was riding suddenly bolted and began running, which threw your Plaintiff violently forward and flexed his back, resulting in serious and permanent injuries as will be hereinafter more fully detailed.

VI.

Plaintiff alleges that the Defendants, their agents, servants and employees were careless, reckless and negligent in the following particulars, to wit:

(a) That the Defendants, their agents, servants and employees, were negligent in failing to disclose

the wild nature and manner of the said horse, especially wherein Plaintiff had revealed to the Defendant's agent, Virgil Dillon, that it had been quite a long time since he had ridden a horse.

(b) That the Defendants, their agents, servants and employees, were negligent in representing the horse in question was gentle, when they knew, or should have known with the exercise of ordinary care, that said horse had a habit of suddenly running, and that they knew that said horse was not satisfactory for use in a riding stable.

(c) That the Defendants, their agents, servants and employees, were negligent in that they were experts in training and handling of horses and that they allowed the Plaintiff to mount and ride said horse and that the Defendants, while acting in the capacities aforementioned, knew from their superior knowledge concerning horses that this particular horse might, or probably would suddenly break out and run at full speed, when they knew full well that the Plaintiff was not an experienced rider.

(d) That the Defendants, their agents, servants and employees, were negligent in that they possessed the superior knowledge of all the horses in said stables, knowing their peculiar characteristics to run at full speed without any urging, and that at the time the Plaintiff was severely injured, the Defendant, Virgil Dillon, without any warning to the Plaintiff, broke out in full speed with his mount, which was unknown to the Plaintiff but which caused Plaintiff's mount to suddenly bolt forth and

break out into a speed, and that this said negligence was the cause of Plaintiff's injuries.

That each and every specific act of negligence hereinabove detailed and/or a combination of same, were a direct, positive and proximate cause of Plaintiff's serious and severe injuries and resulting damages.

VII.

Plaintiff would show that as a direct result of his being thrown violently forward by the sudden motion of said horse, he sustained a compression fracture of the 10th dorsal vertebra, also damaging the 10th and 11th dorsal spinous processes, all resulting in marked muscle spasm, resulting in damage to the lumbo-sacral area which has caused damage to the vertebrae in the entire spinal column and impairment of the discs in the entire spinal column, more particularly in the dorsal region, and that said injuries have resulted in hypertrophic spurring of the margins of the lumbar vertebrae, particularly around lumbar vertebra 4, all of which has affected his entire nervous system and resulted in permanent disability.

That as a result of said injuries, Plaintiff has been permanently disabled and has suffered great pain and mental anguish and which has also resulted in the disruption of Plaintiff's entire nervous system and that said condition will continue the rest of Plaintiff's natural life. That by reason of all the above and foregoing, your Plaintiff, Dr. Robert L. Hargrave, has been injured and damaged in the sum of \$100,000.00.

VIII.

Plaintiff would further show that due to said injuries, which he sustained due to the negligence of the Defendants, he has been forced to limit his practice of medicine and surgery, due to his injuries and pain and suffering, and as a result thereof, his practice has decreased and that he has sustained a loss of earnings in the past and will sustain a loss of earnings and medical and surgical fees in the future, to his further damage in the sum of \$100,000.00.

IX.

Plaintiff would further show that as a result of the injuries he received on the above date, he has been forced to seek medical aid and care and has had to have numerous x-rays made. That such x-rays and medical care and attention has amounted to the sum of \$1,000.00, which sum is just, fair and reasonable. That he will require further treatment and care in the future, which will amount to the approximate sum of \$5,000.00, which sum will be just, reasonable and necessary and for which past and future medical expenses Plaintiff asks his damages.

X.

Plaintiff would further show that the said Defendant, Virgil (Blackie) Dillon, was an agent, servant and employee of the Defendant, Wellman, and that immediately before and at the time of Plaintiff's injuries, the Defendant, Virgil (Blackie) Dillon was acting within the scope of his employ-

ment for his said master, E. G. Wellman, to wit, in that he was carrying on his duties for said Defendant Wellman in caring for and looking after said horses in said stables, in renting out said horses and accompanying the Plaintiff on said trip.

Wherefore, premises considered, Plaintiff prays that the Defendant be cited to appear and answer herein, and that upon final hearing hereof, he have his judgment against the Defendant in the sum of \$206,000.00; for all costs of suit in his behalf expended, and for such other and further relief as he may show himself entitled to receive.

KOURI AND BANNER,

/s/ L. R. BRETZ,

Attorneys for Plaintiff.

/s/ PHILIP S. KOURI,

One of Counsel.

Endorsement

Plaintiff respectfully requests a jury trial in this cause.

/s/ PHILIP S. KOURI.

[Endorsed]: Filed March 20, 1957.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, E. G. Wellman, and for his separate answer to plaintiff's complaint on file herein admits, denies and alleges as follows:

First Defense

The complaint fails to state a claim against this defendant upon which relief can be granted.

Second Defense

This defendant admits the allegations contained in paragraphs I, II, III, IV, X, and in paragraph V admits that plaintiff at the time and place alleged, rented some horses for the purpose of riding to a lake; alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs VII, VIII and IX; denies each and every other allegation contained in said complaint, specifically denying any negligence or carelessness on his part or on the part of his agents, servants or employees, and further specifically denying that the horse involved was wild in nature and manner or in any other way unsuitable for the purpose rented.

Third Defense

If this defendant was negligent in any of the matters set forth in said complaint, then and in that event any injury received by plaintiff was due to and caused by the contributory negligence of the plaintiff and his failure during the times mentioned in said complaint to exercise such care and caution for his own safety as a reasonably careful and prudent person under the circumstances then and there existing could, would and should have exercised. That the personal injuries sustained by plaintiff, if

any, were proximately due to and caused by his own contributory negligence.

Fourth Defense

At all times referred to in said complaint plaintiff was a male adult of average intelligence or better and in possession of normal faculties of observation and then and there fully able to observe, understand and ascertain the facts and circumstances existing, having represented himself to the defendant as an experienced horseman; plaintiff elected to place himself on said horse and thereby voluntarily assumed entirely any risk of injury to himself resulting, or which might result, out of or in connection with the ordinary risks incident to horseback riding.

Wherefore, having fully answered, defendant, E. G. Wellman, prays that plaintiff take nothing by his complaint herein, and that this defendant have his costs and disbursements herein expended.

ART JARDINE,
JOHN D. STEPHENSON,
ALEX BLEWETT, JR.,
JOHN H. WEAVER,

/s/ By ALEX BLEWETT, JR.,

Attorneys for Defendant E. G.
Wellman.

Acknowledgment of Service Attached.

[Endorsed]: Filed February 5, 1958.

[Title of District Court and Cause.]

PLAINTIFF'S REQUEST FOR
INSTRUCTIONS

Comes now the plaintiff, Dr. Robert L. Hargrave,
and respectfully requests that the Court give the
plaintiff's requested instructions numbered 1 to 9,
inclusive.

KOURI & BANNER,
L. R. BRETZ,
/s/ By L. R. BRETZ,
Attorneys for Plaintiff.

Instruction No. 1

You are instructed that under the doctrine of *res ipsa loquitur* it means that when an instrumentality which causes injury, without any fault of the injured person, is under exclusive control of the defendant at the time of the injury, and that the injury is such as in the ordinary course of things does not occur if one having such control uses proper care, law infers negligence on the part of the one in control as the cause of the injury.

The doctrine is especially applicable when there exists the relationship of passenger and carrier.

Whitney v. N. W. Greyhound, 125 Mont. 528.

Instruction No. 2

You are instructed that a bailor of animals has a duty to warn the bailee or rider of the habits, traits or propensities of the animal where there is good

reason to believe that the rider or bailee will be injured unless warning is given to him. And the bailor or owner of the animal, or his agent, servant and/or employee has the duty to warn the rider or bailee, or call it to his attention before the commencement of a sudden gallop of the animals, if the owner or his agent, servant and/or employee were riding in company with the rider and bailee as a guide or one in charge of a riding trip.

14 Am. Jur. Sec. 14:1129, P. 646.

Instruction No. 3

You are instructed that to make an act wanton, the party doing the act or failing to act must be conscious of his conduct, and though having no intent to injure, must be conscious, from his knowledge of the surrounding circumstances and existing conditions that his conduct will naturally and probably result in injury to another.

38 Am. Jur. Sec. 48, 364 (Negligence).

Instruction No. 4

You are instructed that a person is guilty of contributory negligence only in so far as he, or some person for whose conduct he is responsible, is at fault. A person's right to recover is not affected by his having contributed to his injury unless he was in fault in so doing. Fault can be predicated upon the person's conduct only where such conduct was in violation of a duty on his part to exercise care. There is no contributory negligence without the violation of some duty, and there

can be no contributory negligence when no duty is placed on the plaintiff to exercise care.

Knight v. LaGrande, 271 P. 41, 61 ALR 256,—
38 Am. Jur. P. 858-9.

Instruction No. 5

You are instructed that the doctrine of assumption of risk does not apply unless the particular condition of peril if any, has continued long enough so that the person alleged to have assumed the risk can be found to have known or to have been charged with knowledge of the danger, if any. The doctrine of assumed risk is based upon voluntary exposure to danger and is applicable only in cases where the injured person might reasonably elect whether or not he should expose himself to peril. If the exposure of the injured party to the peril, if any, was due to his inability reasonably to escape after he became, or should have become aware of the danger, the doctrine does not apply.

Alexander v. GN RR 51 Mont. 565, 154 P. 914.

Instruction No. 6

You are instructed that in a contract of hiring with one who rents horses for riding purposes in the absence of any notice to the contrary, there is contained an implied warranty to the rider, that the renter or owner of the animal knew or had exercised reasonable care to ascertain the habits, traits and propensities of the horse and that the animal was safe and suitable for the purpose for which the

owner or keeper hired the horse to the renter or rider thereof.

To inform himself of the habits, traits, disposition and propensities of horses which he keeps in his stable for hire, is the duty of the keeper or owner, and if he knows or in exercise of reasonable care should ascertain that his animals are unsafe and unsuitable under certain condition, he is liable for injuries to his customers resulting from the habits, traits and propensities of the animals so hired to his customers. The relationship of bailor and bailee, on the contract of hire, comes into being between the parties, and the bailor impliedly warrants the horse as being fit for the purposes for which it was hired.

Mateas v. Fred Harvey 146 F 2d, 989.

Instruction No. 7

You are instructed that when personal property is delivered to another under a contract of hiring, the relation is bailment for the mutual benefit of both parties.

You are further charged that a bailor or owner of animals which to his knowledge possess habits, traits or propensities likely to result in injuries to their riders, is under duty to inform the bailee or rider thereof; and in the case of a bailor for hire, liability may be predicated upon bailor's or owner's failure to use due care in furnishing an animal suitable for the purpose for which it was hired.

3 CJS Sec. 13, P. 1098,—*Koser v. Hornback*, 75

Idaho 24, 265 P 2d 988,—*Palmquist v. Mercer*, 272 P. 2d 26.

Instruction No. 8

A common carrier may be defined as one who holds himself out to the public as engaged in the business of transporting persons or property from place to place for compensation, offering his services to the public generally. Everyone who offers to the public to carry persons, is a common carrier of whatever he thus offers to carry.

You are therefore charged that a common carrier must use the utmost care and diligence for the safe carriage of persons, and must provide everything necessary for that purpose and must exercise to that end a reasonable degree of care.

9 Am. Jur. P. 430,—Section 8-701 RCM (1947).,—and *Brown v. Columbia Amusement* 91 M174, 6 P 2d 874.

Instruction No. 9

You are instructed that an invitee is one who enters upon the premises of another in the interest of, or for the benefit of, the occupant or owner of such premises, or in a matter of mutual interest, or in the usual course of the business of such occupant or owner, or on his invitation, express or implied. With respect to an invitee, the owner of a riding academy owes the duty of exercising ordinary and reasonable care in furnishing of horses that do not have habits, traits or propensities likely to result in injuries to their riders.

And you are further charged that the knowledge of a servant of the owner, of the traits or propensities of the animal in whose charge it has been placed, amounts to the knowledge of the master or owner.

Herbert vs. Ziegler, 139 A. 2d, P. 699.

Instruction No. 10

If you find from a preponderance of the evidence that defendant E. G. Wellman instructed his agents and especially said Virgil Dillon as to their duties respecting the selection and hiring of horses for paying patrons, and if you find from a preponderance of the evidence that the said Virgil Dillon was instructed by the defendant to advise paying patrons as to the habits of the trail horses, and if you find from a preponderance of the evidence that Virgil Dillon failed to advise plaintiff Dr. Robert L. Hargrave as to the habits of his horse on June 23rd, 1956, then you may consider this failure to advise and instruct, an act of omission and as negligence within the meaning of the courts instruction on such subject.

Instruction No. 11

If you find from a preponderance of the evidence that Virgil Dillon on June 23rd, 1956 at the time of renting a horse to plaintiff failed to instruct him as to the habit of the horse to follow the lead horse at all times, and failed to warn or caution plaintiff respecting the fact that his mount would gallop if the lead horse should do so, then such an

omission to instruct and caution may be considered a failure to exercise ordinary care for the safety of plaintiff and is negligence as defined by the courts instruction on such.

Instruction No. 12

If you find from a preponderance of the evidence that Virgil Dillon did on the 23rd day of June, 1956 suddenly and without warning to plaintiff cause his horse to gallop or run along the trail and that the plaintiff's horse was caused by such action to follow suit, then such an act may be considered a failure to exercise ordinary care for the safety of plaintiff and is negligence as defined by the courts instruction on such.

Plaintiff's Proposed Statement of the Case Respecting Negligence

Plaintiff maintains that the defendant Wellman was negligent through the actions of his employee, Virgil Dillon on June 23, 1956 in several ways, the first being that he failed to advise, instruct or warn plaintiff in any way that plaintiff's mount might commence a gallop or run in the event that his (Dillon's) horse should do so because of the fact that plaintiff's mount was a trail horse and trained to follow the action of the lead horse; plaintiff urges that the second allegation of negligence is based on Virgil Dillon's sudden action in urging his horse ahead at a gallop on the return trip from Lake Josephine, he knowing at the time that such accelerated movement would cause the horse of

plaintiff to follow suit, since the training of the horse was of such a nature as to expect that he would do the same thing that the lead horse would do.

If you find from the evidence that it was the custom of defendant through his agents and employees to instruct patrons as to the habits of the trail horses rented and if you find from a preponderance of the evidence that Virgil Dillon failed on June 23, 1956, to follow this custom and to instruct plaintiff respecting the habit of his horse to follow the lead trail horse at all times, then you may consider this omission to follow the custom as negligence defined by the court's instruction on the subject.

[Title of District Court and Cause.]

VERDICT

We, the jury in this action, find for the defendant upon the claims stated in the complaint.

Dated this 23rd day of January, 1959.

/s/ WILLIAM E. DAY,
Foreman.

[Endorsed]: Filed and Entered January 23, 1959.

In the District Court of the United States, District
of Montana, Great Falls Division

Civil Cause No. 1917

DR. ROBERT L. HARGRAVE, Plaintiff,

vs.

E. G. WELLMAN, doing business as WELLMAN
ENTERPRISES, Defendant.

JUDGMENT OF GENERAL VERDICT
FOR DEFENDANT

This action came on regularly for trial on the 20th day of January, 1959, with Philip Kouri and L. R. Bretz appearing as counsel for Plaintiff and Alex Blewett, Jr., and George McCabe, as counsel for Defendant. A jury of twelve persons was regularly impaneled and sworn to try said action, and witnesses on the part of the plaintiff and defendant were duly sworn and examined. After hearing the evidence, the arguments of counsel and the instructions of the Court, the Jury retired to consider their verdict and subsequently returned into the Court with the verdict signed by the foreman, and being called, answered to their names and say: "We, the jury in this action, find for the defendant upon the claims stated in the complaint."

Dated this 23rd day of January, 1959.

/s/ WILLIAM E. DAY,
Foreman.

Wherefore, It Is Ordered, Adjudged and Decreed that the defendant have and recover from Plaintiff, Defendant's costs and disbursements incurred herein in this action, amounting to the sum of Five Hundred Eleven and 80/100 Dollars (\$511.80).

Judgment Entered this 26th day of January, 1959.

/s/ DEAN O. WOOD,
Clerk.

[Endorsed]: Filed and Entered January 26, 1959.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Dr. Robert L. Hargrave, the Plaintiff in the above entitled and numbered cause, hereby appeals said cause of action to the United States Court of Appeals for the Ninth Circuit, sitting at the Federal Building in San Francisco, California, from a judgment entered in this cause of action on the 23rd day of January, 1959.

Filed this 19th day of February, A.D. 1959.

L. R. BRETZ,
KOURI AND BANNER,
Attorneys for Plaintiff.

/s/ PHIL KOURI,
One of Counsel.

Affidavit and Acknowledgment of Service Attached.

[Endorsed]: Filed February 19, 1959.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents: That we, Dr. Robert L. Hargrave, as Principal, and the other signers hereto as Sureties, acknowledge ourselves to be jointly indebted to E. G. Wellman d/b/a Wellman Enterprises, Appellees in the above cause, in the sum of Seven Hundred Sixty-One and 80/100 (\$761.80) Dollars conditioned that, whereas, on the 23rd day of February, 1959, in the District Court of the United States for the District of Montana, Great Falls Division, in a suit pending in that Court wherein Dr. Robert L. Hargrave was Plaintiff and E. G. Wellman, d/b/a Wellman Enterprises was Defendant, numbered on the civil docket as Civil Action No. 1917, a judgment was rendered against the said Dr. Robert L. Hargrave, as Plaintiff, having filed in the office of the Clerk of said United States District Court a notice of appeal to the United States Court of Civil Appeals for the Ninth Circuit to be holden in the City of San Francisco, and State of California.

The commission of the above obligation is such that if the said Dr. Robert L. Hargrave, Plaintiff, shall prosecute his appeal to effect and answer all costs after the appeal is dismissed, or after the judgment is affirmed, shall be modified, then the above obligation is void; else shall remain in full force and effect.

Witness our hands this the 20th day of February,
A. D. 1959.

/s/ ROBERT L. HARGRAVE,
Principal.

[Seal] TRINITY UNIVERSAL
INSURANCE COMPANY,

/s/ By N. L. THOMPSON,
Attorney in Fact,
Surety.

[Endorsed]: Filed February 27, 1959.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America
District of Montana—ss.

I, Dean O. Wood, Clerk of the United States
District Court for the District of Montana, do
hereby certify that the annexed papers, to-wit:

Complaint

Answer

Plaintiff's Request for Instructions

Verdict

Judgment on General Verdict for Defendant

Notice of Appeal

Points Relied Upon for Appeal

Cost Bond on Appeal

Motion to Extend Time for Filing Record and
Docketing Appeal

Order Extending Time to File Record and
Docket Appeal

The Praecept and Designation of the Record

Designation of Additional Portions of the Record;
and the Reporter's Transcript in a separate volume, accompanying this certificate, are the originals filed in Case No. 1917, Dr. Robert L. Hargrave, Plaintiff, vs. E. G. Wellman, d/b/a Wellman Enterprises, Defendant, and designated by the parties as the Record on Appeal in said cause, and I further certify that I transmit herewith as a part of the Record on Appeal, as designated by the parties, the original exhibits introduced at the trial of said cause, the said exhibits being as follows, to-wit:

Plaintiff's #1, Drawing of Bit.

Plaintiff's #2, Drawing of Bit.

Plaintiff's #3, Drawing of Bit.

Plaintiff's #4, Drawing of Bit.

Plaintiff's #5, Photo.

Plaintiff's #6, Photo.

Plaintiff's #7, Photo.

Plaintiff's #8, Photo.

Plaintiff's #9, Photo.

Plaintiff's #10, Photo.

Plaintiff's #11, Photo.

Plaintiff's #12, Photo.

Plaintiff's #13, X-Ray.

Plaintiff's #14, X-Ray.

Plaintiff's #15, X-Ray.

Plaintiff's #16, X-Ray.

Plaintiff's #17, X-Ray.

Plaintiff's #18, Grocery Bill—Page 13 of the Deposition of Ryan.

Plaintiff's #19, Grocery Bill—Page 13 of Deposition of Ryan.

Plaintiff's #20, American Table of Mortality.

Plaintiff's #21, X-Ray.

Plaintiff's #22, X-Ray.

Plaintiff's #23, X-Ray.

Plaintiff's #24, X-Ray.

Plaintiff's #25, X-Ray.

Plaintiff's #26, Medical Report.

Plaintiff's #27, Medical Report.

Plaintiff's #28, Medical Report.

Plaintiff's #29, Medical Report.

Defendant's #30, X-Ray.

Defendant's #31, X-Ray.

Plaintiff's #32, Doctor's Report.

Defendant's #33, Map.

Defendant's #34, Photo.

Witness my hand and the Seal of said Court at Great Falls, Montana, this 18th day of May, 1959.

[Seal]

DEAN O. WOOD,

Clerk,

/s/ By C. G. KEGEL,

Deputy Clerk.

In the District Court of the United States, District
of Montana, Great Falls Division

Civil No. 1917

DR. ROBERT L. HARGRAVE, Plaintiff,

vs.

E. G. WELLMAN, d/b/a WELLMAN ENTER-
PRISES, and VIRGIL DILLON,
Defendants.

TRANSCRIPT OF TESTIMONY

Before Honorable William J. Jameson, United
States District Judge (with a jury).

January 20, 21, 22 and 23, 1959. At Great Falls,
Montana.

Appearances: For the Plaintiff: McCabe, Mc-
Cabe and Bretz, Attorneys at Law, Great Falls,
Montana (by Mr. Bretz); Kouri and Banner, 927
Oil and Gas Building, Wichita Falls, Texas (by Mr.
Kouri). For the Defendant: Jardine, Stephenson,
Blewett & Weaver, Attorneys at Law, First Na-
tional Bank Building, Great Falls, Montana (by
Mr. Blewett and Mr. McCabe). [1]*

* Page numbers appearing at bottom of page of Reporter's
Transcript of Record.

E. G. WELLMAN

having been duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Bretz): Will you state your full name for the record please, Mr. Wellman.

A. E. G. Wellman.

Q. And will you tell the jury where you reside at this time? A. Essex, Montana.

Q. And how long a time have you resided there?

A. Approximately two years.

Q. Would you tell us where you resided prior to that time? [8]

A. Bear Creek Ranch, which is eleven miles east of there.

Q. What is your occupation or profession? Would you tell us that?

A. Guest ranching and saddle horse concession, Glacier National Park.

Q. And how long a time have you had this saddle horse concession?

A. Approximately eight years.

Q. And where do you principally operate the concession in the park?

A. Well, in the entire park.

Q. Does that include the area about Many Glaciers? A. Yes, it does.

Q. And what do you use these horses for up there?

A. We use them for saddle horses, pack horses.

(Testimony of E. G. Wellman.)

Q. And you rent these horses to the general public? A. That is right.

Q. And can you tell the jury what the general charge is that is made for rental?

A. The general charge for half day trips at the present time is \$5.00 or all day trips are \$7.50 and we have a two hour ride at \$3.50.

Q. And you say that you have pack horses and also riding horses? [9] A. Correct.

Q. Is it possible, or do you use the pack horses for riding? A. No.

Q. They are a separate category, are they?

A. Yes.

Q. How do you select your riding horses?

A. By training them for such. We have pack horses, which naturally are heavier type horses, and sometimes we have a dual purpose horse, but usually they are designated as different. Some of the pack horses have never been ridden.

Q. You say these horses are trained specifically for riding purposes? A. That is right.

Q. I wonder if you could tell us what this training consists of?

A. It is not like common ranch work is. They are not trained to break out, or roping or anything. They are kept as gentle as possible. When they are haltered at four to six months of age, they are worked with constantly so that they become inclined to work as they should, for guests of that type.

(Testimony of E. G. Wellman.)

Q. Well, the training then consists of halter breaking them, is that it?

A. That is one step, yes.

Q. What would be the next step after that? [10]

A. Well, sir, at six months of age you wouldn't do much more with them at that time. Then they are released and the next following spring perhaps we take them back and bring them through the same steps of halter breaking. After that is done they are put into a corral and maybe a saddle is put on them. Nobody mounts with them at that time. Maybe two weeks after gentling them down, so that they understand what you want, perhaps we put one of the reins, put a bridle on them and tie one of the reins onto the saddle and keep them in a circle. After that we turn them the other way, and perhaps another week later we mount them and ride them around the corral so that they understand the commands and what we want of them.

Q. Now do you have employees, I take it?

A. Pardon?

Q. You have a number of employees, I take it, that assist you in this business?

A. Yes, I do.

Q. How many employees do you have in your Many Glaciers there?

A. It can vary from seven to fifteen.

Q. And have you ever had occasion to employ one Virgil Dillon to work for you?

A. I have.

(Testimony of E. G. Wellman.)

Q. And how long a time has he worked for you?

A. Oh, the past eight years. [11]

Q. Now he would have first went to work for you about 1950, I take it? A. Yes.

Q. And were you acquainted with his experience at the time of your hiring Mr. Dillon?

A. Yes, he was highly recommended. He has worked in the Park for a good many years.

Q. What did his duties consist of at Many Glaciers in the year 1956? A. As a guide.

Q. As a guide? And what are the duties of a guide?

A. Generally maintaining and helping maintain the horses, and leading the people on trips.

Q. You say that he leads the people?

A. That is right. A guide is sent with each party, each person.

Q. And are the horses ever allowed to go by themselves? A. No, sir.

Q. I take it then it is the guide's responsibility to see that the horses follow him, is that generally what it is? A. Correct.

Q. Now I wonder if you could tell us who it is that prepares these horses for the general public to ride, who saddles them and bridles them? [12]

A. Each guide helps so that he knows his horse is in shape to go. They are assigned approximately ten each.

Q. Mr. Dillon had ten horses assigned to him in 1956?

(Testimony of E. G. Wellman.)

A. I am sure he must have, if he was at the hitch rack, yes.

Q. And he would personally saddle the horses?

A. He would have helped.

Q. When you say he would have helped, I take it there are others who would have helped?

A. We have a barn boss, a corral man, you bet you.

Q. They work together? A. Right.

Q. And does that include the installation of the bridle and bit? A. Right.

Q. So that Mr. Dillon would perhaps bridle half of them and your barn man would handle the others? A. Very true.

Q. I wonder if you could tell the jury what types of bits you use up there, very generally?

A. Most of them are a mild port bit, by Crocket.

Q. What is that bit made out of?

A. Aluminum.

Q. Aluminum. And when you say mild port, what do you mean by that? [13]

Mr. Blewett: Your Honor, may I just rise at this time so that the record is straight in connection with the discussion we had prior to trial. If the evidence being adduced through this witness is in connection with that, I would like an objection entered to this as not being within the scope or line of the pleadings.

The Court: Yes, you may have a continuing objection to all this line of testimony. The Court will overrule the objection subject to motion to

(Testimony of E. G. Wellman.)

strike if not properly connected up, and also subject to appropriate instructions to the jury.

Mr. Blewett: Do I understand then any reference to the type of bridle or bit or saddle is subject to a continuing objection?

The Court: That is right, it won't be necessary for you to make objection. All of this evidence with reference to the type of bit and saddle and equipment is subject to the objection.

Mr. Blewett: I understand that is not only of this witness, but any witnesses.

The Court: All witnesses. That will save objections.

(The question was read by the reporter.)

Q. Would you tell us what you mean by a mild port?

A. Mild port—are you familiar with bits?

Q. Yes, I am.

A. The port in a bit—now we have a mild port which [14] perhaps could raise an inch. Your bit is flat in the center. There is a mild port, you can buy them that raise 3 inches, but you don't use them in the park because the humane society enters into it, and they are too severe. That is what I mean by mild port.

Q. I wonder if it would be possible to have you show us on a piece of paper what you mean by port?

A. I would be very happy to.

Q. (Drawing) I have drawn the shanks in. I wonder if you will put the port on there for us?

A. Yes, I will do it (draws).

(Testimony of E. G. Wellman.)

Q. And this would be——

A. A mild port.

Q. A mild port. And these would be aluminum bits?

A. These particular bits are aluminum, yes.

Q. And I believe you have identified them as being a Crocket bit? A. Yes.

Mr. Bretz: I wonder if we could mark this as a plaintiff's exhibit, proposed exhibit #1.

(Plaintiff's proposed exhibit #1, being an illustration of a bit, was marked by the clerk for identification.)

Mr. Blewett: If the record may show that the defendant has no objection to the proposed plaintiff's exhibit #1 provided it is for illustrative purposes only. It is not [15] drawn to scale and it is not a true and accurate representation. I may ask the witness some questions, but I am willing it go in then with that understanding, it is illustrative.

Mr. Bretz: Yes.

The Court: Plaintiff's Exhibit #1 is received for illustrative purposes.

(At this time Plaintiff's Exhibit #1, being an illustration of a bit, was made a part of the record and received into evidence by the Court.)

Q. I wonder, Mr. Wellman, if you would mark on the drawing——

A. Let's complete the bit first. You have a bit strap that goes on and a few other things.

Q. I understand that. Would you like to put the chin strap in?

(Testimony of E. G. Wellman.)

A. I certainly would, if you are going to have this for an exhibit. (Draws.)

Q. This would be—— A. The curb strap.

Q. And may I ask you what this strap is made of? A. It is made of leather.

Q. It is a leather strap. So that the jury will understand the parts of a bit, for those who are not acquainted, I will mark on there an arrow pointing to that, and this piece you have drawn on here is aluminum?

A. Yes, that is right. The entire bit is made of aluminum. [16]

Q. You mentioned a moment ago that this port is curved in inches.

A. I wouldn't say it was curved in inches. It has an inch raise in it.

Q. It has a raise of about an inch?

A. Yes, it could vary.

Q. That you mean would be from the level——

A. To the top of the curve.

Q. So if we marked in here (marking).

A. Approximately one inch, yes.

Q. One inch, that would be approximately right, would it not? A. Yes.

Mr. Bretz: I might just exhibit that so that the jury can see what we are talking about.

Mr. Blewett: Your Honor, I don't want to be understood that I am waiving the previous objection by allowing this in.

The Court: That is understood, you have the continuing objection.

(Testimony of E. G. Wellman.)

Q. The type of bit we have referred to, Mr. Wellman, is this what you call a grazing bit?

A. Right.

Q. And I believe the sides of the bit would be called the shank, would they not? [17]

A. Right.

Q. And would you have some estimate as to the length of the shanks on these particular bits we talk of now?

A. About six and a half inches. They are curved back a little bit. That is why they are a grazing bit.

Q. Are six inch shanks the most common in your experience?

A. We use them up there, yes. They have been very prominent the last five years.

Q. I wonder if you can tell the jury the purpose of the shank on a bit?

A. That helps you to control your horse.

Q. Does that provide any leverage?

A. Yes, it does on the curb strap.

Q. And when you apply some pressure to the rein, the curb strap draws tighter, does it not, on the jaws of a horse?

A. It does.

Q. Do you use any other type of bits?

A. We use a snaffle bit. It is a mild bit. Everything we use up there is very mild.

Q. For those of the jury who don't know what a snaffle bit is, I wonder if you could draw generally all of that?

A. The fact is we start all our colts with snaffle bits and they have a large rein on the side, and

(Testimony of E. G. Wellman.)

they are not so apt to pull them into their mouth.

Q. I wonder if you would show us generally what they are? [18]

A. I will try (draws). They have a break in the center.

Q. And reins are attached to each side?

A. Yes, and you can also use a chin strap on them.

Mr. Bretz: I wonder if you would mark this as Plaintiff's Exhibit #2, for illustrative purposes only?

(At this time Plaintiff's Exhibit #2, being an illustration of a bit, was marked by the clerk for identification.)

Q. Would the length of the bit be the same as the other one approximately?

A. Approximately, yes.

Q. Wide enough to go into the horse's mouth?

A. Yes.

Mr. Bretz: (To jury) You can get an idea of what we are talking about. Pass that around.

The Court: I don't believe that has been received in evidence.

Mr. Bretz: Excuse me. I would offer that in evidence for purposes of illustration only.

Voir Dire

Q. (By Mr. Blewett): Mr. Wellman, does this bit which you have drawn in Exhibit #2 have the same shank, so to speak, and curb strap?

A. No, it does not have a shank at all. It has

(Testimony of E. G. Wellman.)

two round rings as I have designated, at the end of the bit.

Q. And a chin strap? [19]

A. Yes, you can put them on or you can use them without. When we are breaking colts you use them without.

Mr. Blewett: Subject to the same qualifications I have no objection.

The Court: Plaintiff's Exhibit #2 is received for illustrative purposes.

(Whereupon Plaintiff's Exhibit #2, being an illustration of a bit, was received into evidence.)

Q. (By Mr. Bretz): Now with regards to the snaffle bit that we are talking about, have you ever used that on horses that are rented to the public?

A. Yes, we certainly do.

Q. And you also, I take it, use a grazing bit?

A. Right.

Q. Do you use a curb strap with your snaffle bit on the horses that are rented? A. No.

Q. You don't use a curb strap? A. No, sir.

Q. Is there any reason for that?

A. There is. We usually rent those to children, and sometimes they want to play, some of them seven or eight or nine, and they can get hold of the rein and the horse will go right down the trail following the horse in front of it. That is why we use it. [20]

Q. In other words, a rider could use as much pressure on them, on the reins as they want?

(Testimony of E. G. Wellman.)

A. On that particular type of bit.

Q. On the snaffle bit, and it wouldn't particularly phase the horse?

A. Yes, sir. If you said whoa the horse would stop dead still. They are fifteen to twenty years of age.

Q. Do you ever rent horses that are younger than that to the general public?

A. Certainly.

Q. Are you acquainted with the plaintiff in this action?

A. I met the gentleman yesterday, yes.

Q. And I believe you previously gave your deposition about this particular case, did you not?

A. Yes.

Q. And do you recall the particular horse that is concerned with this suit?

A. I think so, yes.

Q. Would you tell the jury the age of this horse?

A. At that particular time he would have been coming six in the fall, in August.

Q. A six year old? A. Yes.

Q. Do you still have the horse?

A. I certainly do. [21]

Q. For the record, what do you call the horse?

A. Skeeter.

Q. Skeeter? And what kind of horse is he? Does he have any special breeding?

A. No, he does not. Quarter horse and what we call a cold blood mare.

(Testimony of E. G. Wellman.)

Q. What do you mean by the term "cold blood mare"?

A. It is just a ranch mare who has no particular breeding. We get away from what we call a "hot blood."

Q. Now going back to the subject of bits again, I wonder if you would tell the jury what parts of the bit add to the control of the horse?

A. The bit and chin strap.

Q. In other words, it would be important to have a shank of some length?

A. The shank is there, not very much. You don't need hardly any. It depends how you adjust it.

Q. And the port in the bit, is that important?

A. Not very, no.

Q. You would say that most of the control is through the pressure of the curb strap on the jaw of the horse?

A. Right, because they have two bones here that are very sensitive. That is why they use more hackamores and things instead of a bit.

Q. Do you ever use hackamores? [22]

A. I have rode a good many horses with them, yes, sir.

Q. With regards to the renting of horses?

A. No, sir.

Q. Why wouldn't you use a hackamore?

A. Because the average guest wouldn't know how to use them, what they are meant for even.

Q. The average guest, what is the experience of the average guest?

(Testimony of E. G. Wellman.)

A. I would say eighty-five per cent of our people have never been on a horse.

Q. And do the guests have a tendency to pull on the reins of the horse?

A. Not necessarily, because we usually ask each one have they ever ridden before they get on a horse. If they say "no" we say put the reins over the saddle horn and leave the horse alone.

Q. And do they do that? A. They do.

Q. These horses, I believe you testified usually the ones that are rented follow the guide?

A. Right.

Q. And is that the way they are trained?

A. They are.

Q. So if a rider has the reins over the saddle horn, so to speak, the horse will do whatever the lead horse does? [23]

A. Well, yes, he should. He will follow him, if that is what you mean.

Q. And the rider wouldn't have any control over the horse would he, with the reins there?

A. Not supposed to. We have had guests pull the reins and have them go off the trail. We would rather have them go down the trail than off the trail.

Q. Do you know what type of bit was used on the horse called Skeeter we are talking about?

A. One of these port bits.

Q. The one you have called a mild port?

A. Yes, sir.

(Testimony of E. G. Wellman.)

Q. And did that bit have the six inch shank on it?

A. I think they are about six and a half, to be exact. I think you can look the number up. It is P1005 in any Crocket catalog.

Q. How many years had the horse Skeeter been in service? When I say "service" I mean rented to the general public, in 1956?

A. Well, he would have been used two years. You see usually working a horse like Skeeter, a colt, you can't put them in steady the first year, so you use them part time and see how they are going to go. Maybe they won't turn out good and have to replace them. Before he ever went to the Park he was used at the ranch to find out whether he was suitable. The next year he was used, and the next year 1956 he was ridden. [24]

Q. Do you recall the color of the horse?

A. Yes, I would say sort of dark sorrel.

Q. Would that be about the same color as dark mahogany?

A. Sort of a chestnut, I would say, yes, similar.

Q. Could you also identify it as being maybe light brown?

A. Well, it could be. It depends. Some people would call it that. I would say dark sorrel if I was identifying him.

Q. Now would you say that the horse we are talking about, Skeeter, was trained the same as the other horses?

A. Yes, right.

Q. He had had the same amount of training?

(Testimony of E. G. Wellman.)

A. Yes, he had the sufficient amount of training or he wouldn't have been out at the hitch rack.

Q. He would do the same as any other horse?

A. That is right. Every horse that was at that hitch rack would.

Q. Do you recall the color of the mane?

A. It is a little lighter, and the tail is a little lighter.

Q. Lighter brown? A. Yes.

Q. Do you ever have occasion to use any spade bits on any of these horses there? [25]

A. No. I cut the bit out of one of them with a horse that was brought up from Texas.

Q. Why wouldn't you want to use one?

A. You can break the roof of a horse's mouth with one of those. That is why we don't use them, if a guest got on and pulled back.

Q. Do you ever have occasion to use a roller on any of these bits? A. No, sir.

Q. Never use any roller? A. No, sir.

Q. Now going back to the guides that you employ up there in the park, I wonder if you can tell us if you gave them any instructions respecting their duties?

A. Yes, they are instructed as to inquiring of each guest if they have ridden, as to his ability, if he has ridden. They are also instructed to know the mountains and scenery, what the guest will see on the trip, and also instructed in the care of his horses, each and every one.

Q. I believe you told me a minute ago that the

(Testimony of E. G. Wellman.)

older horses are used for the children and inexperienced riders? A. Inexperienced, yes.

Q. And that would be the horses that are around oh, eighteen or twenty years of age?

A. No, you could put a three year old on this particular horse. [26]

Q. I wonder if you could tell us, just for background here, just what kind of saddles are used up here?

A. Yes. All my saddles I buy from Haiser in Denver. They are a little wonder.

Q. What kind of girths are used?

A. They are mohair.

Q. That is a cloth type of thing?

A. They are better than cloth. Mohair is a pretty good grade of cloth.

Q. Do the guides each check the saddles after the guests leave?

A. They are checked at the time the guest mounts, and in this particular case, yes, the saddle was checked at the end of the lake.

Q. Does the rider have any special instruction in taking care of the saddle?

A. He is asked if he has ridden, and if he says yes, you give him a little more freedom. You can't be too tough with them because if you do they think you are being unruly. So you take their word for a few of the things they can do.

Q. Were you present at Many Glaciers in June, 1956, when Dr. Hargrave was there?

A. I was in the area, yes.

(Testimony of E. G. Wellman.)

Q. Did you observe the transaction or the returning of the horses? [27]

A. I did not.

Q. Were you in a position where you could have?

A. No, I was down at the corral at the time.

Q. And how far would that have been?

A. About three-fourths of a mile from the hotel.

Q. Can you see the hitch rack from the corral?

A. No, sir.

Q. Do the guests ever go over to the corrals to get their horses?

A. They come over and look the horses over and want to know if they can pick out a certain one.

Q. If they select one, is that the one they get?

A. Not necessarily. We are the judge what horse he gets. Unless he is a guest who has been going there three weeks and we know he can ride, then it might be different.

Q. We have been talking about experienced and inexperienced riders. What do you interpret the word "experienced rider" to mean generally there?

A. Well, we have had people say they are experienced riders and get on them the wrong side of the horse. If we know whether he has ridden and watched him ride, we cannot know until we watch someone.

Q. So if a man told you he was an experienced rider, you would still want to see what he could do?

(Testimony of E. G. Wellman.)

A. You bet you. [28]

Q. And that is part of the instruction, is it, of the guides, to inquire about it?

A. About all you can do is ask them if they have ever ridden. That is about all you can do.

Q. That is about the extent of it?

A. That is right.

Q. Would the horse we are talking about, Skeeter, would he be a suitable horse for the use of children? A. Yes, yes.

Q. And he is rented to children?

A. That is right, right along with the rest of them.

Q. And they would use the snaffle bit we talked of?

A. We would use a port bit. After we get a horse going with that type of bit we don't change it.

Q. You always use the mild grazing bit?

A. Right.

Q. Is the bit that is used on the horse one that stays with him, that is assigned to him, is that right?

A. In our stables at the place where we keep our saddles, each horse has a peg. Each peg is marked with the horse's name. Each bridle is adjusted to that horse, and it had better stay there. If I find it different, somebody is going to be missing. You have to adjust your saddle over again,

(Testimony of E. G. Wellman.)

and each thing has to be readjusted to each horse in order for it to be satisfactory. Each one has its separate duties. They have their separate pad, separate everything. [29]

Q. You have no actual first hand knowledge of the transaction, I believe you testified, that is pertinent to this lawsuit? A. That is right.

Mr. Bretz: I think that is all we have, Mr. Wellman.

Mr. Blewett: It is my understanding under the rule I can't ask him any questions.

The Court: I might say the only exceptions I make to that is where it is necessary to explain something. I don't believe there is anything here, so that is correct. This might be a good time to take a recess. I might suggest to counsel he let the marshal know who will be the first witness after the recess so that they may be here.

Mr. Kouri: Mr. Dillon will be our next witness.

The Court: Court will be in recess fifteen minutes. (Jury admonished.) Court will be in recess fifteen minutes. (10:45 a.m.)

(Whereupon at 11:00 a.m. court was resumed, pursuant to recess, at which time plaintiff, defendant, all counsel and all members of the jury were present.)

Mr. Kouri: Your Honor, by virtue of rule 43B, we would like to call Mr. Dillon as an adverse witness. [30]

VIRGIL T. DILLON

having been duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Kouri): Please state your name to the Court and jury? A. Virgil T. Dillon.

Q. Where do you live?

A. Cutbank, Montana.

Q. How long have you lived there?

A. About thirty years.

Q. And what is your occupation?

A. Well, a horseman I would say.

Q. And how long have you been in that particular occupation and business?

A. Practically all my life.

Q. You are now an employee of Mr. Wellman, of Wellman Enterprises, are you not, sir?

A. No, sir.

Q. You were on June 23, 1956?

A. That is seasonal work.

Q. Yes, sir. My question is were you an employee of Mr. Wellman's in June, 1956?

A. Yes, sir.

Q. How long had you worked for Mr. Wellman?

A. Since he has operated the concession there.

Q. About how long had that been? [31]

A. Up to that time it was about eight years.

Q. And you worked in that in what capacity?

A. As a wrangler.

Q. At what place? A. Many Glaciers.

(Testimony of Virgil T. Dillon.)

Q. But you are not employed for him at this time? A. Right at present, no, sir.

Q. Will you be employed the coming season, in June? A. Perhaps.

Q. Have any arrangements been made to that effect? A. No, sir.

Q. But you do plan to go to work for him this coming season? A. Yes, sir.

Q. You realize you are not a party to this suit?

A. I realize that, sir.

Q. You are a witness and were summoned to come here by your employer, Mr. Wellman?

A. I do not know how the summons read, but I got a summons anyway.

Q. And you were asked to appear?

A. Yes.

Q. Who came here with you?

A. Mr. Wellman. [32]

Q. And how did you come, sir.

A. In his car.

Q. Did you have a summons served upon you by a Federal marshal or a deputy marshal?

A. Well, it must have been some kind of a marshal. I never questioned him. He just handed me the summons and walked off.

Q. Did they tender any money to you?

Mr. Blewett: I object to that as irrelevant, incompetent. It has no bearing on the issues.

The Court: Objection sustained.

Q. During the recess just a moment ago, Mr. Dillon, after Mr. Wellman testified you were out

(Testimony of Virgil T. Dillon.)

in the hall at the end of the hall talking to Mr. Wellman, were you not? A. Yes, sir.

Q. Now in regard to confining your testimony to June of 1956, you were working for Mr. Wellman?

A. Yes, sir.

Q. In the role of a guide? A. Yes, sir.

Q. Do you remember the particular day of June 23rd of 1956?

A. I don't quite understand that question. What kind of day do you mean, the weather?

Q. Do you know Doctor Hargrave, the plaintiff here? [33]

A. Yes, I have met Mr. Hargrave and his daughter.

Q. Do you recall what month it was when you met them? A. In June.

Q. Do you recall the day?

A. Not particularly.

Q. Approximately? A. Approximately.

Q. The early part, middle part, or latter part of the month?

A. I would say it was around the middle part.

Q. And what was the occasion upon which you were meeting them, Mr. Dillon?

A. To take them for a ride.

Q. And did they approach you about going for a ride on some mounts? A. Yes, sir.

Q. And did they have a particular hour in mind, and any particular place to go to?

A. Yes, sir.

(Testimony of Virgil T. Dillon.)

Q. What hour did they state they would like to go?

A. Right away. That was during the noon hour, almost the noon hour.

Q. Did you have scheduled trips? A. Yes.

Q. Was the noon hour a scheduled trip? [34]

A. No, sir.

Q. And did you then make arrangements to take them during the noon hour? A. Yes, sir.

Q. Who all went?

A. Mr. Hargrave and his daughter and myself.

Q. Were the horses saddled up and ready to go?

A. Yes, sir.

Q. Who did you pick the horse for first?

A. Mr. Hargrave.

Q. What kind of horse did you pick for Dr. Hargrave? A. Oh, a gentle horse.

Q. Would you know the name of the horse?

A. I think we called him Skipper.

Q. Skipper? A. Yes.

Q. And what color was the horse?

A. Chestnut.

Q. Chestnut? And what color was the mane?

A. Kind of a light color.

Q. What kind of saddle did the horse have?

A. Western saddle.

Q. You checked the horse and then brought him forward. Did you make any arrangements with reference to the saddle?

A. Not until I had Mr. Hargrave mount. I al-

(Testimony of Virgil T. Dillon.)

ways ask them [35] if they can ride, and a few questions that are necessary.

Q. Had that particular horse been ridden that day before? A. Yes, sir.

Q. And did he mount the horse? A. Yes.

Q. Did he mount on the proper side, the left side? A. Yes, sir.

Q. Did you ask him if he had had any experience in riding horses?

A. I just answered that question.

Q. I beg your pardon, sir.

A. I just answered that question. I said yes, I inquired if he could ride.

Q. And then he mounted, and then what did you do? A. I adjusted his stirrups.

Q. Were they shorter or what?

A. They were longer.

Q. And how much did you take up on the stirrups?

A. Perhaps two and a half inches.

Q. On each side, each stirrup?

A. Yes, sir.

Q. Did you check the cinch?

A. Yes, sir, naturally that is my job.

Q. What kind of fabric is the cinch made of?

A. Mohair. [36]

Q. How old was the saddle?

A. Perhaps a year.

Q. How old was the cinch?

A. It came with the saddle when it was new.

(Testimony of Virgil T. Dillon.)

Q. Then you adjusted the stirrups and he was ready to go? A. Yes, sir.

Q. Then what did you do, Mr. Dillon?

A. Got on my horse and we rode off.

Q. What about the young lady?

A. She was already made ready to go.

Q. Did you make any adjustments on her stirrups? A. No, sir.

Q. What kind of saddle did she have?

A. Western saddle.

Q. And what color was her horse?

A. A bay I believe.

Q. A bay?

A. Yes. There are a variety of bays, light and dark.

Q. And how old was that horse?

A. About six.

Q. And you said Skipper was about how old?

A. I think he is about seven.

Q. Now? [37]

A. Yeah.

Q. And what color horse did you ride?

A. Grey, iron grey.

Q. Is that your regular mount?

A. Yes, I have rode him for ten years now.

Q. How old is he?

A. He is perhaps fourteen.

Q. You have always used him as what you call a lead horse, haven't you? A. Yes, sir.

Q. That is, when you take people on these mounted tours you are in the lead and the other

(Testimony of Virgil T. Dillon.)

horses are behind, or the guests or patrons and the other horses follow the lead horse?

A. That is right, yes, sir.

Q. How many times had Skipper been out that day prior to this noon hour?

A. He hadn't been out that noon hour.

Q. You probably misunderstood me. I believe you said Skipper had been used that day?

A. That is our regular nine o'clock trip in the morning.

Q. How long did that take?

A. Perhaps two and a half hours.

Q. Had the tour just been back?

A. Yes, a short while.

Q. Had you guided that tour? [38]

A. No, sir.

Q. What about the horse that the young lady, Ann, was on, had it been on the previous tour that morning?

A. Yes, sir.

Q. Had your horse? A. Yes, sir.

Q. But some other guide had ridden your horse?

A. No, sir, nobody rides my horse but myself.

Q. Your horse had not been on the tour that morning?

A. That is right.

Q. They informed you that they desired to go to Josephine Lake?

A. Yes, sir.

Q. And then you all started off? A. Yes.

Q. About what time would you say you mounted?

A. About a quarter of twelve, somewhere like that.

(Testimony of Virgil T. Dillon.)

Q. When you left were you there at what you called the hitching post? A. Yes, sir.

Q. How far is that from the stables?

A. Perhaps a little over half a mile.

Q. Who saddles up the horses?

A. All of us do. That is our job.

Q. Had you saddled up any that morning? [39]

A. Yes, sir.

Q. How many?

A. Well, I know I saddled my own, because I wrangled horses.

Q. Did you saddle the one Dr. Hargrave rode?

A. No, sir.

Q. Or the one Ann rode? A. No, sir.

Q. How many horses did you have?

A. Perhaps twenty.

Q. How many were saddled up that morning?

A. We saddled twenty.

Q. Now you left about a quarter after twelve?

A. No, quarter before.

Q. Excuse me, a quarter before twelve. And who was in the lead?

A. The guide, that is myself.

Q. How was the weather that day?

A. Very good.

Q. Was there a particular trail that you took?

A. Yes, sir.

Q. And how did you start out, at what pace?

A. A walk.

Q. How far was the Doctor behind you?

A. Right behind me. [40]

(Testimony of Virgil T. Dillon.)

Q. What about the young lady, Ann?

A. She was right behind the Doctor.

Q. And you proceeded that way for how many minutes, or such?

A. Clear to the lake.

Q. Did you stop any on the way?

A. No, I didn't.

Q. On the way to the lake did a certain incident arise where Doctor Hargrave dropped some film?

A. I do not know whether it was film or not, but it was something, some part of his camera.

Q. He dropped something and his daughter Ann got off her horse and picked it up and handed it to him?

A. Yes, sir.

Q. Did you have a conversation then with the Doctor?

A. No, sir.

Q. Did you observe at any time, that is when you were in the lead, at any time around that time, whether Dr. Hargrave's horse began to trot a little bit then?

A. No, he couldn't get by me, and I was in a walk, my horse.

Q. So you were in a walk all the way?

A. Yes, sir.

Q. Did you have a conversation with the Doctor when you all got to Josephine Lake? [41]

A. No, sir.

Q. Did you remain on your mount?

A. No, sir.

Q. You dismounted?

A. Yes, sir.

(Testimony of Virgil T. Dillon.)

Q. Did the Doctor get off his horse?

A. Yes, sir.

Q. He took some pictures?

A. That was his object of going up there.

Q. Did you talk to him while he was taking his pictures? A. No, sir.

Q. Do you know how many pictures he took?

A. No.

Q. Approximately how long were you all there?

A. About fifteen or twenty minutes.

Q. Ann stayed on her horse, didn't she?

A. No, I believe she got off too.

Q. She dismounted? A. Yes, sir.

Q. But at first you got off, and then Dr. Hargrave? A. Yes, sir.

Q. Then later she did? A. Yes.

Q. Did she do anything with reference to taking any pictures or was she just enjoying the scenery?

A. No, she was just looking at the scenery. [42]

Q. It is a very beautiful area, isn't it, Mr. Dillon? A. Yes, sir.

Q. Do you know how many pictures Mr. Hargrave took? A. No, sir.

Q. About how long would you say you were there? A. Fifteen or twenty minutes.

Q. And did you during that time, while you were there did you check the cinch on your horse?

A. Not necessarily, no.

Q. Did you check the cinch on Dr. Hargrave's?

A. No, sir. I don't have to. I know how they are before I get there.

(Testimony of Virgil T. Dillon.)

Q. Did you check the cinch on the young lady's horse? A. No, sir.

Q. Did you check anything with regard to the equipment on any of the horses?

A. How do you mean that, sir?

A. The bridle, bit or saddle?

A. Certainly.

Q. What?

A. Well, everything in general.

Q. You checked everything?

A. Certainly.

Q. Out there at the lake? [43]

A. Yes, sir.

Q. How far was it that you had rode up there?

A. A little over a mile perhaps.

Q. And what was the temperature would you say? A. Nice, and a little breezy.

Q. All right, then you got ready to come back?

A. Yes, sir.

Q. Did Doctor Hargrave have any difficulty mounting? A. Yes, sir.

Q. Isn't it true that he attempted to mount and the saddle came over and slipped over?

A. No, sir.

Q. And then you came over and said grab the mane? A. No, sir.

Q. And then you helped him on?

A. I helped him on, but I did not say all that.

Q. All right, let's take it step by step. Didn't the saddle slip? A. No, sir.

Q. When he grabbed the horn?

(Testimony of Virgil T. Dillon.)

A. No, sir.

Q. All right, didn't you tell him to grab the mane? A. No, sir.

Q. What did you tell him?

A. I did not tell him much of anything, but he was just [44] getting on the saddle, I boosted him on the saddle and that is when the saddle turned.

Q. And then the saddle turned to the right then?

A. Yes, sir.

Q. About how much?

A. Oh, I would say three or four inches.

Q. All right, was he then securely on the saddle?

A. Yes, sir.

Q. What did you do then?

A. I adjusted the cinch and put the saddle back.

Q. How much did you take up?

A. Not too much.

Q. About how much?

A. Oh, perhaps you can always take in an inch or two.

Q. Of course you have been in this business a long time? A. Yes, sir.

Q. And way back there before you started didn't the Doctor tell you he hadn't had very much experience riding?

A. None of them have that have come up there.

Q. I am asking you a question about Doctor Hargrave?

A. Yes, that is what he told me.

Q. All right, now you have been in the business a long time, haven't you? A. Yes, sir. [45]

(Testimony of Virgil T. Dillon.)

Q. And you know even if you take a short trip like that that the horse will certainly, there will be a little give—in other words, I am not implying they lose some weight, but that exercise will necessitate at times the taking up of the cinch maybe an inch or so, isn't that true? A. That is true.

Q. And you took it up how many inches?

A. I didn't take it up at all along the trail until we got to Lake Josephine.

Q. You took it up how many inches?

A. Perhaps an inch.

Q. You and Doctor Hargrave did not have any other conversation there at the lake?

A. No, sir.

Q. You did not say anything to him?

A. No, sir.

Q. Did you observe him when he got off?

A. Naturally.

Q. When he got off at the lake?

A. Yes, sir.

Q. He got off all right, didn't he?

A. Yes, sir.

Q. Now so we start back? A. Yes.

Q. And about what time is it now? [46]

A. Well, it is getting about 12:30 I imagine somewhere close there.

Q. And going up there was there a particular trail that you stayed on all the way through?

A. Yes, sir.

Q. Lots of foliage, isn't there, on the right and left of the trail? A. Not too much.

(Testimony of Virgil T. Dillon.)

Q. In a certain area, isn't there?

A. No, it is a wide trail.

Q. I am talking about the trees and bushes that are along part of the trail?

A. Yes, sir, the scenery is beautiful, yes.

Q. And it was all nice and green that time of the year? A. Yes.

Q. And was it a straight one or a curved trail? Did it curve in any place?

A. Well certainly.

Q. And how many places?

A. I never counted them.

Q. Would you give us your best recollection?

A. No, sir, I do not know.

Q. A few, or several?

A. A few I would say.

Q. And as a result of that, and in view of the trees [47] and the scenery, the guide can be going ahead at a short distance ahead and the view will be obscured from those behind, with those curves?

A. No, sir.

Q. They are not high enough even with a man or a woman on a horse to hide them?

A. I wouldn't say on the wagon road. It is an old wagon road.

Q. Is it deep? A. No, sir, level.

Q. Shallow? A. Level.

Q. How wide is it?

A. I would say about six or eight feet wide perhaps.

Q. Then two could ride abreast if they wanted to? A. Yes, if they were allowed to.

(Testimony of Virgil T. Dillon.)

Q. But that is not allowed? A. No, sir.

Q. Because you were riding the lead horse and the others were following? A. Yes.

Q. If your lead horse started going at a rapid pace, the others will likewise, isn't that true?

A. No, sir, because I never allow that.

Q. What kind of bit did you have on your horse? [48]

A. A snaffle bit.

Q. What kind of a bit was on the Doctor's horse? A. Grazing bit.

Q. Describe to us what a snaffle bit looks like?

A. What a snaffle bit is?

Q. Yes, sir.

A. Well, it is a bit with round rings on each cheek, and bar through the mouth and a break in the middle. That is what we call a snaffle bit.

Q. That is what you had?

A. That is what I use all the time.

Q. And the Doctor had a grazing bit?

A. Yes.

Q. What about the description of that, sir?

A. Well, it has a straight bar across through the mouth, with about seven inch cheeks on it.

Q. Mr. Dillon, I wonder would you mind making just a little sketch. I know you are probably not an artist, I am not either, but I mean a sketch first of the snaffle bit and the grazing bit, if you would please, and just illustrate a sketch of it.

A. (Drawing.)

Q. What is this?

(Testimony of Virgil T. Dillon.)

A. That is the snaffle.

Q. What are you going to draw over here? [49]

A. The grazing bit.

Q. I am going to give you a separate piece of paper. Would you draw the shank on that?

A. There is no shank.

Mr. Blewett: I have no objection subject to the same qualifications heretofore made.

The Court: It is received for illustrative purposes subject to the continuing objection.

(Whereupon Plaintiff's Exhibit #3, being an illustration of a bit, was received into evidence.)

Q. Now please, sir, draw that grazing bit sketch, a sketch of it?

A. Approximately it will be. (Draws.)

Q. Certainly.

A. That is a break in there.

Q. What kind of a port is that?

A. Small port.

Q. Small port? A. Yes.

Q. You may have your seat again.

A. (Resumes stand.)

Mr. Kouri: Would you please mark that, sir?

Mr. Blewett: May I ask him a question, your Honor?

The Court: You may.

Q. (By Mr. Blewett): Mr. Dillon, is this [50] illustration you have drawn here the bit itself, or does it include that chin strap, or is the chin strap a part of the bit? A. This is just the bit.

(Testimony of Virgil T. Dillon.)

Mr. Blewett: I have no objection subject to the same qualifications.

The Court: Plaintiff's Exhibit #4 is received for illustrative purposes, subject to the same objection.

(Whereupon Plaintiff's Exhibit #4, being an illustration of a bit, was received into evidence.)

Q. (By Mr. Kouri): I am handing you Exhibit #4, for the purpose of the record, the little sketch you made, Mr. Dillon, and you have put the shanks on the bit here, and I am handing you this exhibit which you drew as the grazing bit?

A. Yes, sir.

Q. And that is the type of bit that Doctor Hargrave had on his horse? A. Yes, sir.

Q. What is the approximate length of the shank?

A. Seven inches I imagine, six and a half or seven inches.

Q. What metal is it made of?

A. A lot of them are aluminum, steel or silver, whatever you have.

Q. You don't recall what that particular one was? [51] A. No.

Q. Did it curve?

A. The shanks barely curved slightly.

Q. And there are some that are longer, that type of bit that are longer?

A. They are all regular bits.

(Testimony of Virgil T. Dillon.)

Q. They don't make them longer than the seven inches plus?

A. That is what we use. No, sir.

Q. What is the purpose of the length of it?

A. The purpose of the grazing bit is to let the horse loose to graze, or to tie him in a stall with a bridle on, and he can still eat.

Q. What about riding is concerned?

A. They are not too severe a bit.

Q. What about riding one, what is the purpose of the length? A. The length of the shank?

Q. Yes, sir?

A. That is to control your horse.

Q. Control? A. Yes.

Q. And this has a chin strap with it?

A. Yes, sir.

Q. What is the purpose of the chin strap? [52]

A. That is to pull your shanks back against his jaw behind, to tighten up.

Q. Do you have any part leather at the ends, in the middle for the strap?

A. It varies. Not necessarily.

Q. Have you seen those? A. Yes.

Q. Are they still used?

A. Not necessarily.

Q. What is used more? A. Leather.

Q. What kind of leather is used on the strap?

A. Just leather usually.

Q. And if it is pulled continuously over a period of say years with that leather strap, it is going to have some effect on the horse's lower jaw then?

(Testimony of Virgil T. Dillon.)

A. Yes.

Q. In fact, you have seen cases where it is sort of—over a period of years it has affected the nerves in there? A. Yes, sir.

Q. Did you use any type of roller? A. No.

Q. You have seen them? A. Yes, sir.

Q. Aren't they the type that have the port like you [53] have described here on this bit, and there is a little blunt metal roller that is dull and won't hurt the horse's mouth? A. Yes, sir.

Q. What are they used for?

A. To my knowledge I do not know. I have never used one.

Q. But you have seen them? A. Yes.

Q. They don't cause any injury to the horse's mouth? A. No.

Q. You do have more control with them?

A. Not necessarily.

Q. Mr. Dillon, getting back to the shank again, isn't it true that the longer the shank, the more control you would have? A. Naturally.

Q. And the more of the curve on the shank of the bit, the more control you would have of the horse? A. No, sir.

Q. You have bits you use there with children in riding? A. Yes, sir.

Q. What type are they? A. Snaffle bits.

Q. Will they stop a horse?

A. Yes, sir. [54]

Q. A young child, say ten years old, will they stop them? A. It is their ability.

(Testimony of Virgil T. Dillon.)

Q. Isn't it true that the whole setup you have there for the horses for the guests to follow the lead horse is for the bit to be actually ineffective, whether it be snaffle or grazing bit?

A. Not necessarily.

Q. But lots of times though they are supposed to follow the lead horse? A. They do, yes.

Q. That is the rule?

A. It is not necessarily the rule, but that is what we follow.

Q. That is the custom?

A. That is the custom of the trail horse, yes, sir.

Q. And that is what you abided by on that day?

A. Yes, sir.

Q. Going up and coming back?

A. Yes, sir.

Q. All right, coming back to about twelve thirty? A. Yes.

Q. You take the lead? A. Yes, sir.

Q. Who is next? [55]

A. The Doctor.

Q. And then the young lady, little Ann, his daughter? A. Yes, sir.

Q. Had the horses been fed?

A. Yes, sir.

Q. At what time?

A. We feed them twice a day, morning and evening.

Q. What time that morning were they fed?

A. Oh, perhaps the time we get in with them would be approximately seven o'clock.

(Testimony of Virgil T. Dillon.)

Q. And then what time in the evening?

A. Five thirty.

Q. You all came back through the same trail?

A. Yes, sir.

Q. Does that trail have a particular name?

A. The Josephine Lake trail, yes, sir.

Q. Did you stay within a close distance of each other?

A. Yes, sir.

Q. And what pace were you going?

A. Walk.

Q. And the others behind you?

A. Were walking too.

Q. Did you have any particular appointment back at either the hitching post or at the hotel?

A. Not until two o'clock, no, sir. [56]

Q. Had you eaten your lunch? A. No, sir.

Q. What time do you usually eat lunch?

A. During the lunch hour, the noon hour rather.

Q. When is the noon hour? When do you usually eat?

A. Between twelve and one.

Q. How long did it take you to go up there?

A. Oh, about three quarters of an hour, not much more.

Q. And likewise it would take you coming at the same pace the same length of time to come back?

A. Yes, sir.

Q. It would put you about one fifteen coming back?

A. We left there perhaps earlier. We were close to the lake at twelve thirty.

(Testimony of Virgil T. Dillon.)

Q. You came on down the trail back towards the hitching post? A. Yes, sir.

Q. How far is the hitching post from the hotel?

A. Oh, I would say—there are a lot of steps there. I never counted them. I would say fifty yards perhaps from the lobby of the hotel.

Q. You eat in the hotel? A. No, sir.

Q. Where do you eat?

A. In our own camp. We have our camp there.

Q. Now you stated you were ahead there coming back with Dr. Hargrave and his daughter. About how far apart were you three?

A. About a horse length. About the same distance as when we went up.

Q. Did you continue that all the way through?

A. Yes.

Q. Just about a horse length apart?

A. Yes.

Q. Until you got back to the hitching post?

A. Yes, sir.

Q. No stops? A. Yes, sir.

Q. Well, I just got through asking you. Maybe I am not making myself clear.

A. You said did they follow that way back to the hitching rack. But there was a stop.

Q. Were you looking behind from time to time?

A. Practically all the time.

Q. Your horse could go right on back without any trouble at all on that distance, he had made the trip many times hadn't he, or she?

A. Without a rider you mean?

(Testimony of Virgil T. Dillon.)

Q. Yes. A. No, I don't think so. [58]

Q. Well, you said you had been up there for quite some time?

A. Yes, sir, but how do you mean, me turning the horse loose?

Q. If you were acquainted with that trail, you had gone up it many, many times?

A. Yes, but I don't turn the horse loose without a rider.

Q. I am asking, you have done that many times?

A. Yes.

Q. Over a period of many years? A. Yes.

Q. Do you mean to tell me if you got off that horse and called or clapped your hands, he wouldn't go ahead to the hitching post?

A. He would probably go to the first bunch of grass.

Q. He would eventually go to the hitching post?

A. Eventually, maybe a day or two later.

Q. All right, you said that there was a stop there? A. Yes.

Q. At one point there little Ann road up to the side of you? A. No, sir.

Q. Did she ride up to the side of you at any time? A. No.

Q. She at that occasion I am talking about, asked you [59] let's go just a little faster, and you without turning around to see whether the Doctor was behind you even, and who was obscured from view, spurred your horse on and took off at a gallop, and so did her horse and so did the Doctor's?

(Testimony of Virgil T. Dillon.)

Mr. Blewett: I understand there is a lot of latitude here on the right to cross examine an adverse witness, but I think the question just propounded assumes a state of fact which has not yet been presented in this case, and it is a compound question. This witness may not be as educated as Mr. Kouri. I would like Mr. Kouri to ask him one question at a time and not to assume a state of facts not yet in this case. I would like him to be admonished to do that.

Mr. Kouri: I will certainly reframe the question, your Honor.

The Court: I think it would be well to divide the question.

Mr. Kouri: Yes, sir. Thank you, sir.

Q. (By Mr. Kouri): You did, Mr. Dillon, go into a run, did you not? A. No, sir.

Q. You deny that you went into a run with your horse? A. Yes, sir.

Q. Did you go into a trot?

A. No, sir, not with my horse.

Q. Did you go into a gallop? [60]

A. No, sir.

Q. Did you go into a canter? A. Canter?

Q. Yes, sir? A. No.

Q. You then heard the holler or the call from Doctor Hargrave and stopped your horse, didn't you? A. No, sir.

Q. And you heard little Ann holler to stop?

A. No, sir.

Q. And you turned around in your horse, and

(Testimony of Virgil T. Dillon.)

turned backward, and then Dr. Hargrave's horse stopped? A. No, sir.

Q. And you said "Now what has happened?"

A. No, sir.

Q. Sort of I mean, you said "Now what happened?" A. No.

Q. In other words, going up there don't you remember this, that Dr. Hargrave's horse began to jump at times a little trotting, and he stopped him and kind of told you about it, and you looked back and you didn't like that necessarily? A. No.

Q. So on this incident you said "Now what happened?"

A. No, I didn't. Not very many words were exchanged with me and Mr. Hargrave. [61]

Q. All right, you will get a chance through your counsel to say whatever you like. He was sitting up there on his horse and paralyzed, wasn't he?

Mr. Blewett: I object to this. This cross examination can go on under proper rules, but by this Mr. Kouri is assuming with this witness a state of facts not in this case, propounding questions to him on an evidence basis that is not even in this case yet. And the question of whether the Doctor is paralyzed is a question in issue. I object and ask that counsel be admonished.

The Court: I don't think this witness will know he was paralyzed.

Mr. Kouri: I will question him on his observations.

The Court: Whatever he observed.

(Testimony of Virgil T. Dillon.)

Q. (By Mr. Kouri): From your observation was he sitting just up there not moving?

A. He was nearly off his horse.

Q. What did you do then?

A. I did not do anything. He did not give me time. He said "I want to get off my horse." I said that is perfectly all right, Mr. Hargrave. I said it is not far from the hotel, just stroll right on down. In the meantime he changed his mind and we went on to the hitch rack.

Q. I know it has been some time ago, and you have had [62] a lot of guests, but didn't he say he couldn't get off the horse? A. No, sir.

Q. And you asked him though would you like to walk down the rest of the way, taking it easy? Do you admit that?

A. Not the exact words, no.

Q. You offered to help him off?

A. Help him off, yes.

Q. But he sat there?

A. He sat right back down in the saddle, yes, sir.

Q. And did you look at his saddle to see whether it was on straight or not?

A. Certainly, I could see it.

Q. It was off about four or five inches, wasn't it? A. No, sir.

Q. And didn't little Ann call your attention to it? A. No, sir.

Q. And you did not straighten it out?

A. At Lake Josephine I did.

(Testimony of Virgil T. Dillon.)

Q. I mean at this place we are talking about?

A. No, sir.

Q. Then you all came on in there, from there to the hitching post? A. Yes, sir.

Q. And then back at the place where he was sitting there on the horse, Doctor Hargrave, didn't he tell you that [63] he thought maybe he hurt some spurs in his back? A. Spurs?

A. Yes, sir.

A. Oh, I don't remember that.

Q. Were the reins in his hand?

A. Reins? He wasn't wearing spurs.

Q. Didn't he tell you he thought he had popped some spurs in his back? A. No, sir.

Q. All right, you are not telling the jury that he did not say that?

A. Not to my knowledge.

Q. All right, he was sitting on the horse. Did he have the reins in his hands? A. Yes, sir.

Q. How did he look from your observation, his facial expression?

A. He looked like he was worried about getting off. He had most of his weight off the saddle. That is where he wanted to get off.

Q. But he stayed on? A. Yes.

Q. What kind of wearing apparel did you have on? Did you have jeans? A. Yes, sir. [64]

Q. You had your boots on? A. Yes, sir.

Q. Did you have spurs? A. Yes, sir.

Q. What created then this situation, if there wasn't any running? A. Created it?

(Testimony of Virgil T. Dillon.)

Q. Yes, sir.

A. Well, he was complaining most of the time as usual. Some people do. So there was no objection from me if he got off and walked or rode or anything else.

Q. You were in the area where the trail makes a bend when all this takes place, weren't you?

A. Yes, sir.

Q. When it all started back there?

A. Yes.

Q. And was he complaining going up there?

A. No, sir, not to me. I have heard some conversation between him and his daughter, but I never paid any mind to that.

Q. But he was complaining coming back?

A. No, sir, not to my knowledge.

Q. When did all this complaining start?

A. When I stopped my horse and he said "I want to get off the horse." [65]

Q. Why did you stop?

A. Because he asked to get off the horse.

Q. Where was Ann all this time?

A. She was behind the Doctor.

Q. So you just heard him complaining and you stopped your horse and thought you would go back and then his horse stopped?

A. No, his horse stopped before I ever looked back, because he was right behind me. So I did not have to look back too far.

Q. But you could tell looking at him he looked worried?

(Testimony of Virgil T. Dillon.)

A. I do not know how a person looks getting off a saddle, but most of his weight was on his stirrup getting off the saddle.

Q. Did you look at the stirrups to see if the ball of his feet were firmly in the saddle?

A. No, I didn't.

Q. Did you straighten out the cinch again?

A. No, sir, it wasn't necessary.

Q. Did you help adjust the saddle in any way?

A. No, sir, I never got off my horse.

Q. You never got off? A. No, sir.

Q. Then you all started back to the hitching post? A. That is right. [66]

Q. And when you got there who got off first?

A. I did.

Q. And then what happened with reference to you and Dr. Hargrave?

A. He got off next.

Q. Did you help him? A. Yes.

Q. And did he say anything then?

A. No, sir, he never said a word to me.

Q. Did you say anything? A. No.

Q. Did he get off? A. Yes.

Q. Then Ann got off?

A. She was already off.

Q. He paid you with a bill and you did not have any change?

A. He paid me with four dollar bills.

Q. You did not go down and get some change?

A. I did not.

Q. And the fee was what?

(Testimony of Virgil T. Dillon.)

A. Four dollars.

Q. And he paid you with four dollars?

A. Yes, sir.

Q. And then where did you go? [67]

A. I went down to the hotel.

Q. Did they go on away?

A. Yes, like that (snapping fingers).

Q. What do you mean?

A. They seemed to be in a hurry. They never said a word to me when they got off their horses.

Q. You did observe the Doctor, and from that observation you saw that same look on his face?

A. No, I never pay much attention to their looks.

Q. Just a few more questions, Mr. Dillon?

A. Yes, sir.

Q. How was Ann, the young lady, his daughter, how was she dressed?

A. She had riding togs on.

Q. How was the Doctor dressed?

A. In a suit.

Q. What kind or color?

A. Kind of a light brown I would say.

Q. Now just answer this please, sir?

A. Yes, sir.

Q. Just answer this yes or no, sir. Have you since that time talked to any of the representatives or agents of the defendant, Wellman Enterprises?

A. How do you mean that, sir?

Q. I am trying to make it as simple as possible.

A. Yes, sir, I have.

(Testimony of Virgil T. Dillon.)

Q. How many occasions?

A. Several, I imagine.

Q. Where? A. In various places.

Mr. Kouri: I believe that is all.

The Court: Do you have any at this time, Mr. Blewett?

Mr. Blewett: Do I understand I can cross examine?

The Court: There were a few instances where he wanted to make an explanation. I will permit that, or you can wait until your own examination.

Cross Examination

Q. (By Mr. Blewett): One thing, you referred to the horse as Skipper. Was it Skipper or Skeeter? A. Skeeter.

Q. You mentioned Skipper.

A. The names were close.

Mr. Blewett: That is all I have now.

The Court: Well, I think perhaps it would be just as well to take a recess now. Court will be in recess until one forty-five (Jury admonished.) Court is in recess until one forty-five. (11:50 A.M.)

(Whereupon at 1:45 P.M. Court was resumed pursuant to recess, at which time the plaintiff, defendant, all counsel and all members of the jury were present.)

Mr. Kouri: Your Honor, we would like at this time to call as our next witness the plaintiff, Dr. Hargrave.

DR. ROBERT L. HARGRAVE

having been duly sworn, was examined:

Direct Examination

Q. (By Mr. Kouri): Please state your name to the Court and jury? A. Robert L. Hargrave.

Q. Doctor Hargrave, what is your profession?

A. Physician and surgeon.

Q. Where do you live, sir?

A. Wichita Falls, Texas.

Q. How long have you lived there?

A. Since 1913.

Q. How long have you practiced medicine in Wichita Falls, Texas? A. Since 1934.

Q. Do you maintain offices there at this time?

A. Yes, sir.

Q. Do you specialize in any particular branch of medicine?

A. I do general practice and I am a specialist in general surgery. [70]

Q. What degrees did you receive prior to the time you went to Medical school?

A. I have one degree before I went to medical school, a bachelor of science degree.

Q. Do you have a masters degree?

A. Yes, sir.

Q. In what field?

A. That is in the medical field, in pathology.

Q. All right, sir, what medical school or schools are you a graduate of?

A. I am a graduate of Tulane University medi-

(Testimony of Dr. Robert L. Hargrave.)

cal school and I have graduate degrees from the University of Minnesota.

Q. After you graduated from the University of Minnesota did you then intern, do intern work?

A. No, that was post graduate work at the University of Minnesota.

Q. Then after that time what did you do with reference to your profession?

A. After I finished my training I went back home and went in practice.

Q. Had you been affiliated with any of the outstanding hospitals in the nation as a surgeon and physician?

A. Only in my training.

Q. All right, and where were those please, sir?

A. Well, I had a fellowship in surgery at the Mayo clinic. [71]

Q. At Rochester?

A. At Rochester, Minnesota.

Q. And what did you do there with reference to the field of medicine?

A. I had a regular fellowship in surgery.

Q. And how long were you there at Mayo Clinic?

A. Two and a half years.

Q. And thereafter did you have any other fellowships?

A. I had one before that in pathology at the University of Minnesota, in Minneapolis.

Q. Doctor, are you a member of the Wichita County, Texas, Medical Society?

A. Yes, sir.

Q. Are you a member of the Texas State Medical Society?

A. Yes, sir.

(Testimony of Dr. Robert L. Hargrave.)

Q. Are you a member of the American Medical Association? A. Yes, sir.

Q. Do you have any other degrees honorary that have been conferred on you since you have been a practicing physician?

A. Well, I haven't had any really degrees, no.

Q. I am talking about any fellowships?

A. I am a fellow in the American college of surgeons and the American Board of Surgery.

Q. The American Board of Surgery?

A. Yes, sir. [72]

Q. Is that where you stand for an examination?

A. Yes, sir.

Q. Is your license duly recorded in Wichita County, Texas, at the clerk's office there at the Court House? A. Yes, sir.

Q. Now, Doctor, when you first started practicing medicine were you associated with any other member of your family in the practice of medicine?

A. Yes, sir, I was associated with my father.

Q. At that time were you associated with any hospital?

A. Yes, sir, when I first started to practice I was associated with a hospital known as the Hargrave Hospital.

Q. Was that your father who built that hospital? A. Yes, sir.

Q. And now that is called what?

A. My father sold that hospital to some Sisters, and they call it now the Bethania Hospital.

Q. Where were you born?

(Testimony of Dr. Robert L. Hargrave.)

A. I was born at Dieg Texas, Hopkins, Texas.

Q. Where was Mrs. Hargrave born?

A. She was born in Minnesota.

Q. How long have you been married?

A. Since 1930.

Q. Doctor, how long did you live in East Texas?

A. We moved away from there when I was four years old. [73]

Q. Was your father practicing medicine at that time? A. Yes, sir.

Q. Did he have any horses?

A. Yes, sir.

Q. For his professional calls and such?

A. Yes, sir.

Q. After that where did you move to?

A. We moved to Kawana.

Q. And he practiced medicine there?

A. Yes, for five years.

Q. What kind of transportation did he use there for his calls?

A. He used horse and buggy to start with and then later on he bought the automobile, he bought a Ford.

Q. How old were you when you left there?

A. I was eight.

Q. Had you had any experience riding horses up until that time?

A. I don't recall. I don't think so.

Q. After you moved where did you live?

A. Wichita Falls in 1913.

(Testimony of Dr. Robert L. Hargrave.)

Q. Did you have any experience there as a young man riding horses, to any extent?

A. After I got a little older I have ridden horses a few times. [74]

Q. I see. When you were in medical school or prior to that did you have any occasion to ride?

A. I think I rode before I went to the University. I don't believe I was on a horse—I mean I might have been once or twice after I started medical school, except one time I did ride out in Washington State.

Q. What year was that?

A. I rode then for a little while in I think it was 1948 or '49.

Q. Had you ridden any at all from 1948 until say 1956?

A. I don't think so. I don't remember, but I am sure I didn't.

Q. All right, Doctor Hargrave, immediately prior to, within say thirty days of June of 1956, state whether or not you had an occasion to be reading one of the national magazines?

A. Yes, sir.

Q. Do you recall what month that was in, if you recall?

A. I read the national magazine all the time.

Q. But immediately prior to June did you see any illustrated item in the National Geographic in regard to a beautiful scenic place in Montana?

A. Yes, sir.

Q. And did you read that article?

(Testimony of Dr. Robert L. Hargrave.)

A. Yes, sir.

Q. Did it have pictures in the magazine? [75]

A. Yes, sir.

Q. What area was it, sir?

A. Well, it was a story about Glacier National Park.

Q. And did you read the item with interest?

A. Yes, sir.

Q. Did you see any picture of anyone in there that you have seen since? A. Yes, sir.

Q. Who was that? A. Mr. Dillon.

Q. Mr. Dillon who testified here this morning?

A. Yes, sir.

Q. And what connection did he have with this article?

Mr. Blewett: To which we object, your Honor.

Mr. Kouri: I will strike that and reframe it, your Honor.

Q. Was his picture concerning and in regard to the item in the magazine, Mr. Dillon's picture?

Mr. Blewett: I have a right to object here. I am going to object at this time, it is incompetent and irrelevant and if he is going to testify what any magazine said it is hearsay.

The Court: I can't see the relevancy of this.

Mr. Kouri: I was laying the groundwork for the trip up here. [76]

The Court: Objection sustained.

Mr. Kouri: Thank you.

Q. (By Mr. Kouri): After reading that then

(Testimony of Dr. Robert L. Hargrave.)

did you make any plans to make a trip to Montana, or to Glacier National Park?

A. Yes, sir, I did, but I thought I was going to come up here—the fact is I thought we might take a trip to Switzerland, but things were such I did not get to go to Switzerland. I wanted to take a vacation, so we decided to come up to the Canadian Rockies and on the route up there we went through Yellowstone Park and Glacier Park up into the Canadian Rockies.

Q. Prior to your leaving did you learn whether or not any of your neighbors were going up, making the same type trip? A. Yes, sir.

Q. Who was that?

A. Mr. and Mrs. Ryan.

Q. Where do they live from your home?

A. Next door.

Q. What does he do?

A. He is a geologist.

Q. And when did you leave, you and your family leave for the trip?

A. I don't remember the exact time, but it was about [77] June 3rd I think, about June 3rd then.

Q. Incidentally did you exchange ideas on the itinerary with your next door neighbors, and did they with you? A. Yes.

Q. And you made the trip with your family, consisting of whom?

A. I made the trip with my wife and my daughter, Ann.

(Testimony of Dr. Robert L. Hargrave.)

Q. And how did you all decide to make the trip? A. We went by automobile.

Q. All right. Then did you have occasion after coming through Yellowstone of going to Many Glaciers National Park?

A. Yes, sir, going up on the trip we went through Glacier National Park, going into Canada, and then coming back from Canada we went through Glacier National Park coming back home.

Q. Did you stop at any particular place in that vicinity of the Glacier National Park?

A. Going up?

Q. No, sir, coming back?

A. Yes, sir, I stayed there at Glacier near Many Glaciers Hotel.

Q. And you were in what kind of automobile?

A. In a Chrysler.

Q. Do you remember what your license number was? A. Yes, sir. [78]

Q. Would you please tell us?

A. The number was 44, and it was EY 44, because I have had that same number and it is the number I have now. The first part might be wrong, but I know the 44 part is correct.

Q. And did you have occasion to see any friends from home on or about June 23rd?

A. Yes, sir, we saw these neighbors of ours in Glacier Park.

Q. Where did you see them first?

A. The first time we saw them was at their camp ground.

(Testimony of Dr. Robert L. Hargrave.)

Q. And did you run into them or did they look you up, or what?

A. Well, before we went on the trip they knew our license number, and we thought that it was possible that we might cross each other on the trip, because they were going into Canada too.

Q. Yes, sir.

A. And they saw our car parked near this Many Glaciers Hotel and left a note on the car that they were at Swift Current Camp Grounds.

Q. They were with another group, I presume?

A. Yes, they were with a group of students that they were taking up to Canada on a geological tour.

Q. All right. Did you have occasion to go up to where the Hotel is to make inquiries concerning a trip on horses to Lake Josephine? [79]

A. Yes, sir.

Q. Who went with you? Who went with you to make the arrangements?

A. Well, Ann and my wife and myself, we were together in the car.

Q. Did Mrs. Hargrave go with you there and go with you, or did she stay in the car?

A. I do not know.

Q. Well, anyway did you meet the agent that had charge of the horses?

A. I did not meet him, he was there.

Q. He was there and you told him what you desired to do? A. Yes, sir.

Q. What was that, Doctor?

(Testimony of Dr. Robert L. Hargrave.)

A. I wanted to go to Lake Josephine to take some pictures of it.

Q. And about what time was that?

A. I think it was about eleven o'clock of a morning. It might have been a little after that.

Q. Was it on June 23rd? A. Yes, sir.

Q. 1956? A. Yes, sir.

Q. And what was the man's name that you talked to? [80]

A. I did not know what his name was.

Q. I mean now that you know.

A. His name was Mr. Virgil Dillon.

Q. What did he say when you said you wanted to go then?

A. He said they did not have any trip then, that it would be two o'clock before they had a trip, but then I told Mr. Dillon that I was anxious to go to the Lake to make some pictures before noon because I wanted to get the light shining in the correct position on the mountains to make the pictures good, because if I took the pictures after noon they would be no good, they would be back lit and would not be good pictures. Then Mr. Dillon agreed to take Ann and myself to the lake. The purpose of going to the Lake was to take pictures and for me to see the lake because I had seen pictures of the lake before in the National Geographic Magazine and in other places, and I wanted to see the lake.

Q. All right, sir, did you see any of the horses at that time when you were there in that vicinity by the hitching post?

(Testimony of Dr. Robert L. Hargrave.)

A. Yes, they had many horses, several horses.

Q. Were they all saddled up?

A. I don't recall.

Q. Did he then agree to take you, in view of your request?

A. Yes, sir.

Q. And who did he obtain a horse for first? [81]

A. He obtained Ann's horse first.

Q. Did he go get a horse and just bring it, or what happened?

A. It is my recollection that one of the other helpers brought a horse up for Ann and Mr. Dillon did not want this particular horse, and he wanted Ann to have another horse, so he got the other horse for Ann.

Q. Did Mr. Dillon himself actually go get the horse?

A. I can't answer that. I do not know if somebody else brought it.

Q. What color was the horse?

A. Ann's horse was what I call a sorrel horse.

Q. What color horse did Mr. Dillon have?

A. He was on a white horse.

Q. What color horse did they get for you?

A. It was a color about the color of this furniture.

Q. Now for the purpose of the record what would you call it?

A. I would describe it as a dirty brown color, and the horse had a lighter mane.

Q. Did you have a conversation with Mr. Dillon

(Testimony of Dr. Robert L. Hargrave.)

prior to your mounting your horse with reference to your riding experience?

A. Not that I remember, no, sir.

Q. Nothing was said? [82]

A. Not that I remember, no, sir.

Q. Did he ask you if you had riding experience?

A. Not that I remember, no, sir.

Q. Did he mount last or secondly?

A. I do not know.

Q. Did you mount your horse?

A. Yes, sir.

Q. On what side? A. Oh, on the left side.

Q. And was there any adjustments made on the stirrups?

A. I don't recall, but probably there was.

Q. I see. What is your height, Doctor Hargrave?

A. Five foot six inches, with my shoes on.

Q. I see. All right, you all started then on the trip, is that right? A. Yes, sir.

Q. Who took the lead? A. Mr. Dillon.

Q. Was anything stated to you about his maintaining and keeping the lead, and you two to follow?

A. No, sir.

Q. Did he give you any kind of instructions, Mr. Dillon?

A. No, sir. We just presumed that he was going to lead off and we would follow.

Q. All right, sir, who was in the middle? [83]

A. Ann.

Q. And you were behind? A. Yes, sir.

Q. Did you have your camera with you?

(Testimony of Dr. Robert L. Hargrave.)

A. Yes, sir.

Q. What kind of camera?

A. Contax 35 MM camera.

Q. What kind of film did you have?

A. Kodachrome.

Q. Color film? A. Yes, sir.

Q. And you all proceeded on toward what was known as the Josephine Lake Trail? Is that right?

A. I do not know the name of the trail. It is just a trail.

Q. How wide is it?

A. Well, part of it is a road that comes up there. I do not know how far the road goes. It is a double road, it is not a good road, but it is standard gauge, automobile road, and then further on up it is my recollection that the road stops and then it is just a single trail.

Q. I see. Is it flanked on the sides by foliage or not? I don't mean all the way.

A. Yes, in places. There are trees going up, on each side of the road on the trail. [84]

Q. Approximately how far would you say it was from the hitching post to the lake?

A. About a mile or a little over, one and a quarter miles.

Q. Were you all going at a slow walking pace riding up there? A. Yes, sir.

Q. Did your horse maintain that pace or did he ever do anything?

A. Sometimes my horse would get a little behind

(Testimony of Dr. Robert L. Hargrave.)

the other horses. He never stopped going up to the lake at all except on one occasion.

Q. We will get to that in just a moment.

A. Sometimes I noticed my horse would go behind just a little bit and then he would catch up with the other horses by taking a slow trot, kind of a jog.

Q. What would you do when he would start trotting? Would you do anything with reference to the reins?

Mr. Blewett: I object to that as a leading question.

Mr. Kouri: I will withdraw it.

Mr. Blewett: I have permitted a lot of leading questions, but I have to object to some of them.

Mr. Kouri: I am sorry, your Honor, I will withdraw it.

Q. Then after the horse jogged, then what did you do, or trotted a little, what did you do? [85]

A. I just sat on the horse and let him jog, I stood up——

Mr. Blewett: Your Honor, one of the jurors called my attention that she did not hear me. Would you speak up.

The Court: Can you hear him?

A Juror: Yes, he is just a little further away.

The Court: You let me know if you don't hear at any time. You just raise your hand if you are not hearing and we will ask the witness to speak louder.

A Juror: Thank you, your Honor.

Q. (By Mr. Kouri): Doctor, did anything hap-

(Testimony of Dr. Robert L. Hargrave.)

pen going up, a little incident going toward the lake? A. Yes, sir.

Q. Please tell the jury in your own words what happened?

A. I dropped a roll of film out of my sweater pocket. It jiggled out and fell down on the ground.

Q. Then what happened?

A. And then I must have——

Q. Let me ask you this. Who was ahead of you at the time? A. Ann and Mr. Dillon.

Q. Your daughter Ann, what did she do then?

A. She turned around and got off her horse and picked up the film and gave it to me.

Q. Then did you all proceed then toward the lake? [86] A. Yes, sir.

Q. Did Mr. Dillon say anything to you after that incident or did he say anything at that time?

A. I don't recall.

Q. Then you proceeded on, did you not?

A. Yes, sir.

Q. And you got to the lake? A. Yes, sir.

Q. What did you do when you got to the lake?

A. I got off the horse.

Q. Did Mr. Dillon get off? A. Yes, sir.

Q. Did Ann get off?

A. I believe she stayed on her horse.

Q. Did you take some pictures? A. Yes.

Q. How many? A. Several pictures.

Q. Did you take any on the way going up?

A. No, sir.

Q. But you took several? A. Yes, sir.

(Testimony of Dr. Robert L. Hargrave.)

Q. How long were you all there?

A. About fifteen minutes.

Q. All right, then was Ann staying in the vicinity [87] with you and Mr. Dillon, or was she riding or what?

A. Well, I think she was riding, if I remember right. She was riding her horse around there.

Q. Did you and Mr. Dillon have a conversation?

A. Yes, sir.

Q. At the time? A. Yes, sir.

Q. Before you attempted to mount your horse again to come back? A. Yes, sir.

Q. What was the nature of your conversation?

A. We talked about the pictures and about the article in the National Geographic Magazine and about some young girls that had taken these pictures, some photographer, and he had been with her when she was taking these pictures, and he told me she had spent all summer up there taking pictures.

Q. Was that all.

A. Because I was interested in taking pictures.

A. Yes, all right.

A. That was our first conversation.

Q. That was the extent of it?

A. It might have been more. I remember that part of it.

Q. After the pictures were taken then what did you do? After the pictures were taken at the lake?

A. Well, I only took three or four pictures up at the [88] lake, and then they weren't too good because the clouds weren't right. It was not a bright

(Testimony of Dr. Robert L. Hargrave.)

day and they weren't too good pictures, so we came back then.

Q. Before you came back, tell us about your mounting your horse?

A. Well, I had a lot of trouble getting on the horse before we started back.

Q. What kind of place were you in with reference to the horse, low, high, medium or what?

A. Well, I was—it was just flat ground there as far as I am concerned, perfectly flat.

Q. Did you put your foot in the stirrup?

A. I put my foot in the stirrup and I grabbed the saddle horn and I couldn't get on for some reason, and the saddle pulled clear over to the left side of the horse; that is, with the horse's left side the way we consider our left, and the right, and then Mr. Dillon straightened the saddle up and tightened the belly belt of the saddle and then when we were ready I started to get on the second time and he told me to catch hold of the horse's mane and I did it and I pulled up on the horse; and I believe he helped me, boosted me up if I remember correctly.

Q. By "belly belt" you mean the cinch?

A. The band that goes around the bottom of the horse, that keeps the saddle on.

Q. Do you know anything about bits they use in these [89] riding stables? A. No, sir.

Q. Anything at all about them?

A. No, sir.

Q. You did not have a chance to observe this bit, did you? A. No, sir.

(Testimony of Dr. Robert L. Hargrave.)

Q. Now in the interest of saving time, you mounted then all of you. Describe to the Court and jury what happened as you came down the trail coming back?

A. We came back in the same position as we went down. Mr. Dillon was first, Ann was second, and I was in the tail or third. And we came down the trail, and when we came down the trail I took some pictures of Ann with my camera, three or four pictures of Ann. On that trail there was a lot of brush like there was going up.

Q. How long did the pictures take?

A. To take a picture?

Q. Yes? A. About a second or two.

Q. Did you stop any?

A. No, I did not stop then.

Q. I see.

A. I did not stop when I was taking the pictures of Ann or Mr. Dillon. [90]

Q. Doctor, I asked you earlier about the foliage there. State whether or not Mr. Dillon and Ann at times coming back would be out of sight of you, in view of the foliage in the upper and lower ground?

A. Yes, sir, they were. Mr. Dillon was I know.

Q. How far apart were you?

A. Well, it varied.

Q. Tell us about the variance.

A. Sometimes we were relatively close and it was a couple of horse lengths between, and sometimes further apart.

Q. Upon how many occasions did Mr. Dillon and

(Testimony of Dr. Robert L. Hargrave.)

Ann, or either one alone, how many times did the view become obscured to where you could not see them coming back, if you recall?

A. I do not know.

Mr. Kouri: Your Honor, it fits in now in the continuity of this testimony, we have some colored slides that were taken. He took the pictures. May we show them?

The Court: You may.

(At this time slide projection equipment was set up in the court room.)

Mr. Blewett: Mr. Kouri, may I ask if these have to do with the horses?

Mr. Kouri: It is relevant to the trip. They were taking a trip.

Mr. Blewett: I just would like to know what they are pictures of. [91]

The Court: They were all taken on this trip, were they?

Mr. Kouri: Yes, with the exception of one which we are not going to show.

A. Well, these pictures, your Honor, are in series that are taken with two rolls of film, and they are in direct series, and they are all the pictures that were taken on that trip. On each end there is a picture that was taken, the picture that was taken immediately preceding the trip and the picture that was taken immediately after the trip.

The Court: I understand those will not be shown.

Mr. Blewett: What I was wondering, your

(Testimony of Dr. Robert L. Hargrave.)

Honor, if they are just pictures of scenery, we admitted in our pleadings they were up there.

The Court: It seems to me that the pictures should be limited to the trail.

Mr. Kouri: We will not offer this. It was taken immediately before. So if you will pull that and put the next one in. (Mr. Bretz operating slide projector.)

A. These are all the pictures I took. That is not the trail.

Q. Just a minute until we get the thing focused.

A. That is not the trail. Take that out.

Q. Now, Doctor Hargrave, we have the screen up and projected with what we will call Plaintiff's Exhibit #5. Please [92] describe that picture, will you?

A. That is a picture of Josephine Lake with my daughter on her horse, and that is Mr. Dillon's horse, the white horse.

Q. On the right? A. Yes, sir.

Q. Did you take this picture? A. Yes, sir.

Q. And does this picture here represent the true condition as existing at the time you took it, of the area and the horses? A. Yes, sir.

Mr. Kouri: Of course we will want to offer that in evidence.

(At this time Plaintiff's Exhibit #5, being a kodachrome transparency, was marked for identification.)

Q. Go ahead.

(Testimony of Dr. Robert L. Hargrave.)

A. If the screen were brought closer up I think it would make better pictures.

Q. Now we have on the screen Plaintiff's Exhibit #6, a colored picture. Did you take that picture?

A. Yes, sir.

Q. On this particular trip, on June 23rd?

A. Yes, sir.

Q. Who is that mounted on the horse there?

A. That is Ann, my daughter. [93]

Q. And where are you approximately in feet behind Ann? How many feet, if you recall?

A. I would say about twenty feet.

Q. I notice there, Doctor, there is a bend here in the trail?

A. Yes, sir.

Q. What kind—how much of an angle does that make there? Is it slight or not?

A. I can't tell any more than what the picture shows.

Q. Where is Blacky there?

A. He is in front.

Q. Do you know approximately how far ahead he was?

A. He was around the curve. I do not know how far.

Q. Now does that picture truly represent the conditions as they existed then in that area along the trail, and the foliage there and everything?

A. Yes, sir.

Mr. Kouri: We will offer that in evidence.

Mr. Blewett: Mr. Bretz, can you brighten that

(Testimony of Dr. Robert L. Hargrave.)

up in any way? The detail isn't as good as it should be.

A. If you could get the screen closer it would be better.

Mr. Blewett: Mr. Kouri, may I ask him a question?

Mr. Kouri: Yes.

Mr. Blewett: Are these on the way up?

A. No, sir, they are on the way back. I made no pictures going up. [94]

The Court: How far was this from the lake, do you recall, Doctor, Plaintiff's Exhibit #6?

A. I don't recall, but I think it was probably a fourth mile from the lake. It could be farther.

Q. (By Mr. Kouri): We show now Plaintiff's Exhibit #7. Doctor, did you take that picture on the occasion in question? A. Yes, sir.

Q. And who is on the mount there, on that horse in the picture?

A. Well, Ann is on the horse on the right and Mr. Dillon is on the horse on the left.

Q. From the way the light is coming down which is more pronounced there insofar as the view is concerned of Mr. Dillon or Ann?

A. Which one can you see the better?

Q. Yes? A. On the picture?

Q. Yes? A. You can see Ann better.

Q. What kind of jacket or coat did Mr. Dillon have on, if you recall?

A. I wouldn't know only what the picture shows. I wouldn't have any recollection what he has on.

(Testimony of Dr. Robert L. Hargrave.)

Q. He has a hat on there, does he not? [95]

A. Yes, sir.

Q. Does that picture truly represent the conditions as they then existed on that date, this picture here? Does that represent what you took?

A. Yes, sir.

Mr. Kouri: All right, we offer that in evidence.

The Court: Where was that taken, Doctor, with reference to Exhibit #6?

A. That was taken next, they are in sequence coming back.

The Court: When you took this picture how far were you from when you took Exhibit #6, the preceding picture? A. I do not know.

Mr. Blewett: Did you offer that in evidence?

Mr. Kouri: I offered it. I will offer them altogether, individually.

The Court: Perhaps we had better go back.

Mr. Kouri: This will be #7.

The Court: You have offered #5, #6 and #7. You are offering #5, #6 and #7 at this time I understand. Any objection?

Mr. Blewett: I have no objection.

The Court: Plaintiff's Exhibits #5, #6 and #7, are received.

(Whereupon Plaintiff's Exhibits #5, #6 and #7, being kodachrome transparencies, were admitted into evidence.) [96]

Q. (By Mr. Kouri): Now, Doctor Hargrave, I show you Plaintiff's Exhibit #8. Now was that taken by you on this occasion? A. Yes, sir.

(Testimony of Dr. Robert L. Hargrave.)

Q. And were you on your horse?

A. Yes, sir.

Q. Like you were on all the rest of them?

A. Yes, I was on horse on all of them.

Q. How far away from the lake was this taken, if you recall?

A. I do not know, but it was further down the trail.

Q. Down the trail? A. Yes.

Q. But insofar as Exhibits #5, #6, #7 and #8, they were taken in sequence, in time sequence?

A. In that order, yes. There are no films that were taken that aren't shown.

Q. I see. Did you have one that did not develop? Did you have one out of the bunch?

A. There is one we did not show because it was the last one.

Q. Is that this one (handing film to witness)?

A. Yes, sir.

Q. Can you make out anything of that at all?

A. Yes, that is a picture of Ann on a horse up at the lake. [97]

Q. Can it be shown here without the cover on it? Can it be put in that?

A. I think you might be able to. It is the last one before this series on the trail.

Q. All right, fine. Now that shows just a portion of Blacky's horse and the major portion of his body on top of the horse, isn't that right?

A. Yes, sir.

Q. And Ann there behind him? A. Yes.

(Testimony of Dr. Robert L. Hargrave.)

Q. Now how far do you think you were behind him then?

A. I think about twenty feet, maybe a little bit further. Maybe twenty-five feet, not very far though.

Q. Now in view of Exhibits #5, #6, #7 and #8, how many, if you recall, how many were taken at turns that you took?

Mr. Blewett: Your Honor, I think the pictures are self explanatory on that.

The Court: I think it should be limited to each picture as you come to it.

Q. This is another taken there at a turn in the trail?

A. I can only say what the picture shows. I have no recollection of that.

Q. Does that look straight? A. No, sir.

Q. All right, thank you. And that represents the true [98] condition that existed at the time you took it? A. Yes, sir.

Mr. Kouri: I believe that is all on that one. We will offer it.

The Court: Any objection?

Mr. Blewett: No objection.

The Court: Plaintiff's Exhibit #8 is received.

(Whereupon Plaintiff's Exhibit #8, being a kodachrome transparency was admitted into evidence.)

Q. (By Mr. Kouri): Now, Doctor, there is Plaintiff's Exhibit #9. Was that taken after Exhibit #8?

(Testimony of Dr. Robert L. Hargrave.)

A. Yes, sir, if they are in sequence—if they are marked in series on them.

Q. This is on the trail coming on back, is that right? A. Yes, sir.

Q. Who is in front? A. Mr. Dillon.

Q. And behind? A. Ann.

Q. Is that the way you all stayed up to this time riding? A. Yes, sir.

Q. And that represents the true condition existing at the time? A. Yes, sir. [99]

Mr. Kouri: We offer that in evidence.

Mr. Blewett: No objection.

The Court: Plaintiff's Exhibit #9 is received.

Q. Now, Doctor, I show you Plaintiff's Exhibit #10. What is that?

A. That is a picture of Swift Current Lake with Mount Wilbur in the background.

Q. Well, we don't offer that. You have two series of film there?

A. That is the next one. I made that from the trail. That is the last picture I took.

Q. Is that the last one you took?

A. That is the last one I took.

Q. Does that represent the true condition as it existed there? A. Yes, sir.

Mr. Kouri: That is #10. We will offer that.

The Court: Where was that taken in relation to the others?

A. It was taken in sequence. It was further down the trail.

The Court: You do not know how much further?

(Testimony of Dr. Robert L. Hargrave.)

A. No, I don't, I do not know, but probably not too far though.

Mr. Blewett: I would like to ask a question on that one. [100]

Voir Dire

Q. (By Mr. Blewett): This is a picture of Swift Current Lake, Doctor? A. Yes, sir.

Q. Is that near the Many Glacier Hotel, or where is it?

A. Yes, sir, it is a long lake.

Q. Is this about where you started out from on the trip to begin with?

A. No, that is coming back.

Q. This is on the way back as you approached the hitching post?

A. There is a clearing there and I took that picture, that is the last picture I took.

Q. This picture then is the last picture you took and it is as you approach the hotel, the Many Glacier Hotel, and the riding post, from where you started, is that it?

A. That is the last picture I took on the way back to the hotel, is that what you mean?

Q. Where in relation to Many Glacier Hotel is this picture taken?

A. Probably one half mile from the Hotel.

Mr. Blewett: I have no objection to its admission.

The Court: Plaintiff's Exhibit #10 is received.

(Testimony of Dr. Robert L. Hargrave.)

(Whereupon Plaintiff's Exhibit #10, being a kodachrome transparency, was admitted into evidence.) [101]

Q. (By Mr. Kouri): Incidentally, Doctor, is there any other transportation that you can go from the hitching post up to this lake other than by this trail and these horses?

A. Yes, sir, you could walk up there, or there is a motor boat that runs up there.

Q. A motor boat? A. Yes, sir.

Q. Is that the only two means, horses and motor boat? A. Yes, sir, or walking.

Q. All right, we are now showing you Plaintiff's Exhibit #11. A. That is of the Hotel.

Q. And when did you take this?

A. I took it that same afternoon that I got back. I think I did. It is possible I might have taken it the next morning, but I believe it was that afternoon.

Q. Does that represent the true condition as you saw it at the time? A. Yes, sir.

Mr. Kouri: All right, we offer it.

Mr. Blewett: I have no objection.

The Court: Plaintiff's Exhibit #11 is received without objection.

(Whereupon Plaintiff's Exhibit #11, being a kodachrome transparency, was admitted into evidence.) [102]

Q. There is one more, the broken one. This one here, what did you say happened to it? It will be Plaintiff's Exhibit #12?

(Testimony of Dr. Robert L. Hargrave.)

A. Well, that film is the last one and I did not have enough film to make a picture, so it—no doubt the company does not mount those unless they are good pictures.

Q. Now there is Plaintiff's Exhibit #12. That is Ann on her horse? A. Yes, sir.

Q. And was that taken going up or coming back, or where at? A. At the lake.

Q. That is where you were taking pictures up there too? A. Yes.

Q. When you had that conversation with Mr. Dillon about the magazine article?

A. Yes, sir, that picture was made, the sequence of this is it should be about second in this row instead of last.

Q. Those you were taking then coming back?

A. No, sir, that was made at the lake.

Q. And the others coming back, is that right?

A. This was made at the lake and those others made at the lake, Ann on the horse and Mr. Dillon's horse grazing, made at the same place this one was made.

Q. And the others obviously show the trail coming back? [103]

A. The others were all coming back. I made no pictures going up.

Mr. Kouri: We offer this in evidence.

The Court: Plaintiff's Exhibit #12. Is there any objection.

Mr. Blewett: There is no objection.

(Testimony of Dr. Robert L. Hargrave.)

The Court: Plaintiff's Exhibit #12 is received without objection.

(Whereupon Plaintiff's Exhibit #12, being a kodachrome transparency, was admitted into evidence.)

The Court: That is all the pictures?

Mr. Kouri: That is all the pictures, yes, your Honor.

Q. All right, Doctor, we have seen these pictures and they have been shown to the Court and jury, all the pictures you took coming back from the lake. Now did anything unusual then happen after this time on the trip back?

Mr. Blewett: Your Honor, I object to that as a leading question.

Mr. Kouri: I will withdraw the question.

The Court: The question is withdrawn.

Q. Did you continue to proceed along coming back to the hitching post, Blacky, Ann and you?

A. Yes, sir.

Q. In the same way? At the same pace?

A. Well, not all the way, no. [104]

Q. All right, then please tell us in your own words and relate from there on further please, Doctor.

A. Well, after I made that last picture, I do not know just how long it was, Ann and Mr. Dillon were a little further up in front, and we went through some more brush and my horse was walking slowly, and then when my horse came in the clear all at once he just started to run just as fast

(Testimony of Dr. Robert L. Hargrave.)

as he could. And at that time Ann and Mr. Dillon were about one hundred yards up in front running their horses. It might be seventy-five yards, but it seems like it was a longer ways. They were pretty far off. They were running their horses, and my horse just from a walk he took off and ran, just right off.

Q. What happened to you?

A. Well, when the horse ran, he threw me back in the saddle and bumped me up in the air, and he kept running and you couldn't stop the horse. I pulled on the reins and you couldn't stop the horse at all, and I pulled as hard as I could, and I was off balance on the horse and the horse was running at full speed, and threw me up and down on the horse and just beat me to death.

Q. Did you feel anything in your body?

A. Yes.

Q. What?

A. After the horse took two or three paces it seems to me like, I do not know how many, but it seems to me like [105] it was right after the horses started to run I felt two places pop in my back, one low down and one up higher in the lower part of your thorax in the spine.

Q. Now please go on from there. You saw them seventy-five to a hundred yards ahead?

A. Yes, sir. Then I hollered and tried to stop the horse and the horse wouldn't stop. And I could see ahead and Mr. Dillon and Ann, they stopped their horses and turned around and by then my horse was

(Testimony of Dr. Robert L. Hargrave.)

pretty close to them and he stopped or slowed down.

Q. All right, when you felt those two pops how did you feel?

A. Well, I just felt it pop, that is all. It hurt.

Q. All right. Then what did Mr. Dillon do when you stopped down there? Had he turned around?

A. Well, I think he did.

Mr. Blewett: I will object as leading.

The Court: Objection sustained.

Mr. Kouri: I will withdraw it.

Q. Then what happened?

A. Well, after I was running down on the horse, and the horse almost—I thought he was going to throw me off the horse and I was trying to stop him. Then when we came up on Mr. Dillon and Ann, who had turned around, then Mr. Dillon turned around and said “now what happened.” [106]

Q. Was he on or off?

A. Was he on or off the horse?

Q. Yes, sir? A. I do not know.

Q. How did you feel?

A. When I said that, I do not know, he was on or off the horse?

Q. How did you feel?

A. I did not feel very good. I told Mr. Dillon that I hurt my back on the horse.

Q. What did he say?

A. (Cont.) And that I wanted to get off and walk to the Hotel, and I tried to get off the horse and I couldn't get off the horse.

Q. Why?

(Testimony of Dr. Robert L. Hargrave.)

A. I just couldn't do it. It was hurting, and I just couldn't get off the horse.

Q. All right, then what happened?

A. Then I told Mr. Dillon I would go on to the Hotel on the horse. Then we proceeded slowly to the Hotel.

Q. In what order, if you remember?

A. In the same order that we had been.

Q. Did he do anything now before you all started back to the hotel? Did he do anything with reference to you or your horse or saddle? [107]

A. Not that I recall.

Q. Did you notice your saddle?

A. No, sir, I don't recall. I do not know. I was hurting bad, and I just don't know what went on, except we went back to the Hotel slowly, and I got feeling better, by the time we got back to the Hotel I could get off the horse.

Q. What were you doing just before your horse started to make this run?

A. I was just sitting on the horse holding the bridle.

Q. Which way were you looking?

A. I do not know. I might have been looking off. I just don't know.

Q. Could you see Ann and Mr. Dillon immediately before your horse started running?

A. It is possible just a split second before I could see him running. It was just a split second before. I do not know.

Q. Then your horse started in?

(Testimony of Dr. Robert L. Hargrave.)

A. My horse started right off immediately.

Q. When you got down to the hitching post what happened? A. Well, I got off the horse.

Q. Did anyone help you?

A. I do not know whether anyone helped me or not.

Q. But what did Ann do?

A. She got off her horse. [108]

The Court: I think this might be a good place to suspend. Court will be in recess fifteen minutes, and the jury will keep in mind the admonition I have heretofore given.

(2:45 p.m.)

(Whereupon at 3:00 p.m., the court was resumed, pursuant to recess, at which time plaintiff, defendant, all counsel and all members of the jury were present.)

The Court: You may proceed.

(Dr. Hargrave was recalled to the stand.)

Further Direct Examination

Q. (By Mr. Kouri): I believe just prior to the recess, Dr. Hargrave, we were up to the time you all came back to the hitching post and you said Ann got off? A. Yes, sir.

Q. Incidentally, what kind of wearing apparel did Ann have?

A. I do not know except what shows in that picture, and I don't remember.

Q. All right, Doctor, now in your own words

(Testimony of Dr. Robert L. Hargrave.)

please relate to the Court and jury what happened next?

A. Well, after I got off of the horse then I paid Mr. Dillon for the ride up there. I asked Mr. Dillon how much it was and he told me it was four dollars, and to me that was a very reasonable amount. But I did not have the change, and I gave Mr. Dillon a larger bill, I do not know what it was, [109] and he went down to the Hotel and got change and brought it back. And after he gave me the change then Ann and I went over to the automobile, or it is possible that Ann went down to the hotel to look her mother up. Anyway, I went back to the car and Mrs. Hargrave joined us there. She was either at the car or joined us there, I don't remember which. And I told her I got my back hurt, and at that time we found a note on our car from these neighbors in Wichita Falls, stating they were staying at Swift Current Camp Grounds and to look them up. So we got in the automobile and drove over to Swift Current Camp Ground and talked to these friends a little bit. By that time, my back was hurting me, and we decided we would stay there that night. We had originally planned to drive on home down the road. But we went to a motel at the tourist court, a nice motel there at Swift Current Lake and stayed that night there. Now then while at the Camp Ground, prior to that Mrs. Ryan had told us about a lecture about the park that was going to take place that night at the Hotel, but after we got to the motel I went to bed because my back was hurting, and I

(Testimony of Dr. Robert L. Hargrave.)

went to bed. And Mrs. Ryan, not hearing from us whether we were going to go to the lecture or not, came up to the motel to our room later on that day and she saw me there in the room and I told her my back was hurting and that I just couldn't take the trip, couldn't go down to the lecture. So Mrs. Hargrave, I think she went to the lecture. I am not sure. But [110] that is the last that we saw of the Ryans. And the next morning rather late we started back home by automobile, and it took us six days to drive back home because I would feel pretty good sometimes and at other times my back would hurt a lot, and I had to stop early. So it is about eighteen hundred miles back home and it took us six days. We averaged about three hundred miles a day coming back, and I know coming back I had a lot of trouble with my back. My wife had to put pillows behind me and put her arm behind my back to hold me up. And while we were at Denver I stopped at a lumber yard and bought a piece of 1 x 12 about 2 feet long to put behind my back so that I could sit back, and that helped me a lot by doing that. And then after we got back home, which was on I think it was on a Sunday, my back continued to hurt, and the next day, Monday, I had some X-ray pictures made of my back.

Q. Where?

A. I had them made at the Bethania Hospital, and they showed some trouble with my back. And for the next two weeks I really did have trouble. I was practically one hundred per cent disabled for

(Testimony of Dr. Robert L. Hargrave.)

the two weeks after I got back home. This thing got worse after I got back home. And I might have made one or two calls or gone to the office two or three times, but otherwise I was home trying to get relief. I had gone to Dr. Maxfield and he gave me some pills to take, and I took them and they made me sick so I quit taking them. For about [111] two weeks I spent most of my time either on a hard bed or on the floor. And I know at one time I remember it was so bad, it was really bad there for a few days. Then the pain got better and I was able to go back to work and to do my work, part of my work anyway, and I got better over a period of about six months. And since then it has been about the same. But after the first X-rays were made that showed this trouble in my back, about a month after that I had another X-ray made of my back and to me it showed an increase in this trouble in my back.

Q. What part?

A. In the lower dorsal spine.

Q. What vertebrae number?

A. The 10th dorsal vertebrae.

Q. Where were these made? You said a month later?

A. They were made at the Bethania Hospital.

Q. Go ahead?

A. Then I was dissatisfied with the treatment I was having and I was worried about the increase, the apparent increase to me, in this vertebrae which was collapsed on the front part of it, which to me had increased in that month. It looked to me like

(Testimony of Dr. Robert L. Hargrave.)

the X-rays, that the condition had progressed, and I was not satisfied with the Doctors that I was going to, and I went to New Orleans and consulted Dr. Wickstrom at Tulane University. And Dr. Wickstrom sent me to Teoro [112] Infirmary. That is a large hospital at New Orleans. He had X-rays made of my spine and my head and my chest.

Q. Excuse me, Doctor, just a moment. Dr. Wickstrom, had you known him before?

A. No, sir.

Q. What does he specialize in?

A. Dr. Wickstrom is an orthopedic surgeon. He is Professor of orthopedic surgery at Tulane University. And the reason I went to him, my son who is now in the Navy was a medical student then, he was a senior medical student, and was working part time in the laboratory under Dr. Wickstrom.

Q. Dr. Wickstrom is an orthopedic surgeon and professor of orthopedic surgery at Tulane?

A. Yes.

Q. He X-rayed you?

A. Yes. He told me I had a compression——

Mr. Blewett: I object to that as hearsay evidence.

The Court: Sustained.

Q. Dr., let's put it this way. Did you see the X-rays that were made of your spine?

A. Yes, sir.

Q. Did you observe anything on it? What did you observe about it, from a medical standpoint?

A. I observed what I had on the other X-rays.

(Testimony of Dr. Robert L. Hargrave.)

Q. What did you see? [113]

A. There was a compression fracture of the 10th thoracic vertebrae.

Q. Did you see it?

A. Yes, the X-ray picture showed it.

Q. How many pictures revealed that?

A. Oh, there were many pictures that revealed that.

Q. You have them here in your possession, all the X-rays that were ever made of your back, do you not?

A. Yes, sir.

Mr. Kouri: Later we will offer them in evidence, your Honor.

Q. All right, go ahead, Doctor. We were talking about the X-rays Wickstrom made?

A. Yes, sir. So Dr. Wickstrom prescribed treatment.

Mr. Blewett: Your Honor, I think from this point on I just about have to have the attorney ask him questions because it is hard for me to foresee what he might say, and I think he has gotten pretty well along on his own, and from this point I would prefer it be in question and answer style.

The Court: Very well.

Mr. Kouri: Very well.

Q. Were you given prescribed treatment by anyone down there at New Orleans?

A. Yes, sir.

Q. By whom? [114]

A. Dr. Dickstrom.

Q. Did you follow that prescription, carry it out and use it?

A. Yes, sir.

Q. Did it help you in any way?

(Testimony of Dr. Robert L. Hargrave.)

A. Yes, it helped some.

Q. And what was it please?

A. He told me to lose weight and to take exercises, prescribed exercises for me.

Q. Did you take them? A. Yes, sir.

Q. What was the nature of the exercises?

A. They were just usual exercises and various types of calisthenic exercises.

Q. And how long a period did you do that?

A. I did that one or two or three weeks.

Q. Did you notice any difference in your feeling?

A. I felt better when I was doing the exercises.

Q. How often would you do them a day, or a week? A. I did them every day.

Q. In the mornings or afternoons or evenings?

A. Well, I think I did them both times, both mornings and evenings both.

Q. Did you see anyone else down there at New Orleans besides Dr. Wickstrom? [115]

A. Not at that time.

Q. All right, what happened then?

A. Well, I went back for another check up. Dr. Wickstrom told me to come back later on. In about two months I went back again.

Q. Tell us what happened?

A. At that time I had more X-rays made.

Q. How many more?

A. Well, several more.

Q. Of what part of your body?

A. Of the spine, thoracic and dorsal and lumbar.

(Testimony of Dr. Robert L. Hargrave.)

spine. There at that time Dr. Ane made the pictures.

Q. Who is he? Give me his background professionally.

A. Dr. Ane was a classmate of mine, and I knew Dr. Ane.

Q. What does he specialize in?

A. He specializes in radiology.

Q. Do you have his X-rays here?

A. Yes, sir.

Q. We have Wickstrom's here?

A. Yes. The ones at Teoro were there.

Q. And we have Ane's there?

A. Yes. I went to Dr. Ane instead of going to Teoro because Dr. Ane's office is downtown and Teoro Infirmary, where the first X-rays were made, is a considerable distance from town. Knowing Dr. Ane, I naturally went to Dr. Ane for the other pictures. [116]

Q. I see. Did you see those X-rays?

A. Yes, sir.

Q. What did they reveal?

A. They revealed a compression fracture of the 10th thoracic vertebrae.

Q. Anything else?

A. There were some spurs around on my back, on the spine.

Q. Had you been X-rayed insofar as your back was concerned back years prior to this time?

A. Yes, sir. I had X-rays of my back made at the Mayo Clinic in 1950.

(Testimony of Dr. Robert L. Hargrave.)

Q. What was the purpose of it?

A. The purpose was to see if I had any trouble with my back because I had had some low back pain.

Q. And who took those X-rays, if you recall, at Mayo Clinic? A. I don't know.

Q. Under what Doctor's supervision?

A. I wouldn't know. Dr. Stroeble is the Doctor, I registered in his section.

Q. Stroeble?

A. Yes. I never knew him before.

Q. Did you then get in touch with them over the last two weeks or so to get a report that was made back in 1950? [117] A. Yes, sir.

Q. You did that at whose request? Who asked you if you would do that?

Mr. Blewett: We object to that as incompetent, irrelevant and immaterial at this time. The Doctor is a Doctor. We haven't raised any question as to his qualifications. We have authorized him to testify to the X-rays and I do not have any idea what counsel for the plaintiff is trying to prove in connection with the report from Mayo Clinic. I would like the argument to be out of the presence of the jury.

(At this time counsel approached the bench and there was argument held outside the presence and hearing of the jury.)

Q. (By Mr. Kouri): Doctor, did you obtain the report from Mayo? A. Yes, sir.

Q. And your Attorney has it? A. Yes, sir.

Q. And copies? A. Yes, sir.

(Testimony of Dr. Robert L. Hargrave.)

Q. Now how long were you down there this second trip to New Orleans when you saw Dr. Ane?

A. How long was I down there?

Q. Yes, sir? A. Oh, a day or two.

Q. Then you came on back home? [118]

A. Dr. Ane only made the X-ray pictures. I saw Dr. Wickstrom again.

Q. Did he make any other pictures?

A. Not Dr. Wickstrom. Dr. Ane made the pictures.

Q. Did you take those pictures, Dr. Ane made to Dr. Wickstrom?

A. No, I think Dr. Ane sent them over.

Q. He saw them?

A. Yes, Dr. Wickstrom examined the pictures.

Q. And you did too? A. Yes, sir.

Q. You came back home after that then?

A. Yes, sir.

Q. Please describe how you were feeling at that time when you got home?

A. Well, I can't recall that, but I was improving up until about six or eight months after. I mean there was gradual improvement in the condition from about two weeks after I got back home from the Park, the condition gradually improved for about six or eight months, and since then it has been about the same, my symptoms.

Q. Before June 23rd, what were your office hours?

A. Well, I don't have any regular office hours.

Q. Were you doing a lot of surgery?

(Testimony of Dr. Robert L. Hargrave.)

A. Quite a bit, yes. [119]

Q. Were you a member of the staff of all the hospitals there? A. Yes, sir.

Q. Were you pretty busy before the 23rd in your practice as a physician and surgeon, keeping pretty busy?

A. I would say so. Of course, business is up and down. Sometimes you don't have much, sometimes you have a lot.

Q. What difference have you noticed since June 23, 1956, in the way you get around and your practice, including your operations and everything? Please tell us.

A. I don't get around as well, I fatigue in the afternoon and I have to go to bed early, and I can't take any emergency service at the hospital. In other words, I just have to do about three fourths of a days work.

Q. How long has that been going on?

A. That has been going on for the last eighteen months. And if I lift anything, or do much stooping or lifting, why I might have trouble that night or several nights after I will have a lot of trouble with my back.

Q. Do you do as much surgery now as before the injury? A. I don't think so, no.

Q. How does it affect you when you are performing a surgical operation?

A. If my back hurts, it just hurts. I have to walk around and straighten up. I have never had an operation where [120] I had to quit the opera-

(Testimony of Dr. Robert L. Hargrave.)

tion, but it slows you if it is uncomfortable, and it hurts.

Q. Did you after Dr. Ane's X-rays seek the services of another orthopedic surgeon?

A. Well, after that I went back to see Dr. Wickstrom for a third time, and I believe for a fourth time.

Q. Yes, sir. Over what period of time?

A. About three months apart.

Q. All right. A. Three or four months.

Q. Were any more X-rays taken?

A. Yes, sir, X-rays were made every time I went back. Perhaps not the last time.

Q. What did they show from your observation?

A. They showed the same condition that was present before.

Q. Did it show anything between thoracic vertebrae #10 and #11, the space there?

A. It showed some narrowing of the space, and there were spurs on the front of the vertebrae.

Q. What was the width of the 10th vertebrae in millimeters? From the radiologist's report?

Mr. Blewett: Just a minute, Dr. Hargrave.

Mr Kouri: We will strike that and introduce it at another time. [121]

Q. All right, Doctor, then you went back a fourth time. Then who did you see?

A. Well, one time I went back, the last time I went back was in August of '58, and I went back to see Dr. Wickstrom, but I did not see Dr. Wickstrom because he had had his knee operated on and

(Testimony of Dr. Robert L. Hargrave.)

he was in the hospital, and I saw some young Doctor there. I have forgotten his name. But then I went over to see Dr. Semone who is professor of orthopedic surgery at Louisiana State University, whom I had known since I was in medical school, Dr. H. T. Semone. That is pronounced Semo. So Dr. Semone looked at the X-ray pictures and he prescribed an arch support for the left foot I think. He thought that that might be contributory possibly to the trouble I was having.

Q. Have you been having any trouble with your feet, any one of your limbs?

A. Yes, but not in relation to this arch support.

Q. I am not talking about that. Have any of your limbs bothered you since the injury?

A. Yes, sir. Since I have been hurt I have had from time to time, most of the time, I have had a burning pain in the bottom of my left foot. Sometimes it will get all right and other times it is present.

Q. How is the condition in your low back?

A. The low back doesn't bother me.

Q. What is your main complaint now? [122]

A. My main complaint is now if I lift or stoop, or even of a morning when I am shaving and bend over forward, I get pain in the back, in the region of the fracture, and if I lift anything or stoop much or do much lifting the pain is apt to be severe and it radiates right around in front of my chest. And, of course, that disables one. You don't feel good when it does that. Then perhaps that night I will

(Testimony of Dr. Robert L. Hargrave.)

have a lot of trouble sleeping. I will have a lot of trouble sleeping. I will be uncomfortable, and that might continue for several days, and then gradually get better. And about the time I think I am going to get well it will recur again and I have the same thing over again.

Q. All right, after having seen Dr. Semone, you came back, and did you see any other orthopedic surgeon?

A. Yes, sir, I saw Dr. Van Deventer.

Q. Dr. Loyd Van Deventer? A. Yes, sir.

Q. Where is he?

A. In Wichita Falls. I talked to Dr. Van Deventer before about my back, but he had never examined it. I thought I would like to have what he thought about it.

Q. Go ahead and tell us now?

A. He examined me and looked at the X-ray films and told me——

Mr. Blewett: Wait a minute. On what he told you [123] it is my understanding that the deposition of Dr. Van Deventer is here, which was taken, and whatever the Doctor has to say may be admitted to that extent.

The Court: I think the objection is well taken. Objection sustained.

Q. (By Mr. Kouri): And did he take X-rays of you, Dr. Van Deventer? A. Yes, sir.

Q. Of what part of your body?

A. He took X-rays of my thoracic and lumbar spine.

(Testimony of Dr. Robert L. Hargrave.)

Q. Did he look at all the other X-rays that were taken of your body? A. Yes, sir.

Q. And did he examine them, look at them on a shadow box? A. Yes, sir.

Q. In your presence? A. Yes, sir.

Q. On how many occasions? A. Twice.

Q. And did you view and see his X-rays that were made? A. Yes, sir.

Q. What did they reveal, keeping in mind that was about over two years ago?

A. They revealed a compression fracture of the 10th thoracic vertebrae. [124]

Q. You saw it? A. Yes, sir.

Q. In his presence? I mean you saw Van Deventer's X-rays?

A. The X-rays he took showed the same thing that the other film showed.

Q. All right, Doctor, you were present when Dr. Van Deventer's testimony was taken in the way of a desposition, were you not? A. Yes, sir.

Q. When was that?

A. About two or three weeks ago.

Q. About the 5th of January?

A. Yes, sir, about then.

Q. And your deposition was taken?

A. Yes, sir.

Q. And Ann's desposition was taken?

A. Yes, sir.

Q. And Mrs. Ryan's, the neighbor's deposition was taken? A. Yes, sir.

(Testimony of Dr. Robert L. Hargrave.)

Q. You were present when all those were taken?

A. Yes, sir.

Q. As a party plaintiff, which you had a right to be?

A. Yes.

Q. How did you come up here from Texas?]125]

A. On this trial?

Q. Yes?

A. I came on the train. I came by Minneapolis.

Q. Did you stop at Minneapolis?

A. Stayed over night at Minneapolis, stayed at the Curtis Hotel.

Q. Is that where Mrs. Hargrave's mother lives?

A. She lives there, but we did not see her mother.

Q. She is quite old?

A. She is 81 I think.

Q. How do you feel, and how have you felt in the past week or so?

A. Well, I feel pretty good up here when I don't have anything to do.

Q. Prior to the time of coming up here, and your practice of medicine and surgery how were you feeling say about three weeks ago?

A. Well, at one time before I came up here I had a lot of trouble. I was going through some X-rays and trying to find some X-ray pictures that could possibly have been made in the past. I went through a lot of X-rays. I had to lift them up, and that caused me a lot of trouble then for several days.

Q. How old are you, Doctor?

(Testimony of Dr. Robert L. Hargrave.)

A. Fifty-four. [126]

Q. Since 1950 at Mayo Clinic up until the time of this injury, June 23rd, had you had any X-rays made of your back anywhere?

A. No, sir, I had no X-rays made of any kind.

Q. Had you had any complaints of any kind in your back?

A. No, sir, at that time I was doing good. Shortly after I had those made at the Mayo Clinic I got better and I did not have any more trouble.

Q. You were able to carry on your practice?

A. Oh, yes.

Q. Let me ask you this. During World War Two were you in the service? A. Yes, sir.

What branch? A. I was in the Army.

Q. What was your rank?

A. I was a Major and later on a Lieutenant Colonel.

Q. What did you do with reference to your duties while in the Army Medical Corps?

A. Well, I had various duties.

Q. Let's take them up step by step. First what general hospital were you in?

A. First I was sent to Billings General Hospital at Indianapolis, Indiana, and I did not like it there because I had a general assignment, and I got transferred to the Air Force and I was sent to New Mexico and I was there about a year. [127]

Q. Doing what?

A. Doing surgery at Rochell, New Mexico, at a small station hospital.

(Testimony of Dr. Robert L. Hargrave.)

Q. Where then did you go?

A. They transferred me to Tuskalooosa, Alabama, to the hospital there, and I stayed there for the rest of the war.

Q. Doing what?

A. Doing surgery, all kinds of surgery. I did hand surgery and general surgery and neuro surgery.

Q. Continually over what period of time?

A. Well, I did that about two years. They kept me in the army a year after the war was over.

Q. Why?

A. Because they said I was essential, they needed me. I had to do this reconstruction surgery.

Q. Then you were out of civilian practice about how long?

A. I was out of civilian practice a little over four years.

Q. Then when did you get mustered out, in nineteen forty what?

A. It was sometime in June of 1946.

Q. Then you were with the rank of Lt. Colonel?

A. Yes, I had been a Lt. Colonel eighteen months before I got out. [128]

Q. Then you came on back to your home?

A. No, after that I was Chief of Surgery at the Veterans Administration Hospital at New Orleans, with the best grade they had at that time.

Q. How long did you stay there?

A. Just a little while. Then I did not like that and I resigned and came back home.

(Testimony of Dr. Robert L. Hargrave.)

Q. And re-opened your office? A. Yes, sir.

Q. You are in the Hamilton Building there at Wichita Falls? A. Yes, sir.

Q. Have you had an occasion to check the number of operations that you have done at the Bethania Hospital there in Wichita Falls in the several past years? A. I did check it.

Q. Did Mr. Blewett ask you about that on the deposition?

A. Yes, I checked them after he asked me.

Q. And they checked the records and you checked the records?

A. I had the record librarian furnish me with the number of patients I had admitted to the hospital and the number of operations I did. That is what I requested.

Q. From the permanent records? The librarian got that from the records? [129]

A. I mean the record room looked for that.

Q. For how many years back?

A. Since 1950 I believe.

Q. 1950 clear up to when? 1957?

A. Yes, sir, up until——

Q. Or '58? A. To the present time.

Q. Up to the present time? A. Yes, sir.

Q. You are willing to give those figures to Mr. Blewett, showing the admissions, the number of patients if he so desires? A. Yes, sir.

Q. He asked you too to produce your income tax records? A. Yes, sir.

(Testimony of Dr. Robert L. Hargrave.)

Q. You did produce them to him at the deposition?
A. Yes, sir.

Q. Dr. please tell the Court and jury whether your income has been enhanced, about the same or increased proportionately to the type of practice that has been in existence in medicine and surgery since this injury of yours?

A. Well, my gross income was less for the year that got injured, in 1956, and I believe it was about the same as it had been in 1957; and in 1958 my gross income is more than it was before. The fact is, it is greater than it has ever been. [130]

Q. Well, was that still in view of the curtailment of your practice?
A. Yes, sir.

Q. In other words, basing your active surgery and practice on the years before the injury, was your income of 1958 in line with the way things were going?

A. Well, of course, that was a good year. I could have done more than that I think.

Q. How much more?

A. Probably twenty-five per cent more, or thirty per cent more.

Q. How much did you make in 1958?

A. I grossed over \$18,000 in 1958.

Q. And you could have made at least twenty-five per cent more?

A. That is what I believe, yes, sir.

Q. Dr. Hargrave, let me ask you this. In view of everything you have related here in your deposition and before the Court and jury with regard to

(Testimony of Dr. Robert L. Hargrave.)

your condition and due to the injury, in view of all of your examination of the X-rays and the way you feel and the pain that you have sustained, what you have related to us, and your loss of sleep and the radiation of pain down that left leg, and in view of all that with reference to your injury and the way you feel, do you have an opinion—I want you to answer this yes or no—do you have [131] an opinion whether or not your future earning capacity will be curtailed or not?

A. Yes, sir.

Q. To what percentage?

Mr. Blewett: To which I object at this time, your Honor. We are agreeable he put into the record his earnings for the past four or five years, whatever is involved. But he has not laid a foundation for this opinion. There are many factors that would enter in, and I think it is an improper question. There is no proper foundation and it calls for an opinion, and he has his own record which speaks for itself as to the earnings this man has. We are willing they go into the record.

Mr. Kouri: I am going to put them in. Then I will show all the earnings. I think, your Honor, certainly regardless of that, Dr. Hargrave is an expert witness. Even if he were a layman I think under the rules we would be allowed, after reviewing the facts as related, to have his opinion of his curtailment, if there is going to be any curtailment of his future earning capacity. If he does have an

(Testimony of Dr. Robert L. Hargrave.)

opinion I think we should be allowed to show what it is.

The Court: There is no question you can show what his earnings are and have been.

Mr. Kouri: Yes, sir.

The Court: I have some doubt about this. What was the question? [132]

Mr. Kouri: I asked what is your opinion as to what your future curtailed earning capacity will be, what percentage.

The Court: Well, I will permit argument on that outside of the presence of the jury.

Mr. Kouri: All right. For the time being we won't pursue it.

The Court: I will reserve a ruling on that.

Q. (By Mr. Kouri): Do you have a list you got from the records of the earnings you got?

A. You mean my income?

Q. The little slip you got of the record?

A. Yes, sir, right here.

Q. Let me see it please. I don't have '58 on there.

A. This is from medical only, gross from medical practice.

Q. Why don't you have '58?

A. It is a little over \$18,000. Because I haven't made up my income tax for '58.

Q. As far as you know, '58 is a little over \$18,000?

A. Yes, sir.

Q. I have this slip here, that is the one you handed me?

(Testimony of Dr. Robert L. Hargrave.)

A. We will say \$18,200. That is about right.

Q. That is for '58? [133] A. Yes.

Q. I am reading just the last five years, but you can have this if you want to go back further. 1953—\$13,477.80. 1954—\$13,679.50. 1955—\$15,815.15. 1956—\$13,255.23. 1957—\$14,680.70. 1958—\$18,200.00. It may be a few more dollars, more or less?

A. It wouldn't be much over.

Q. Do you go home from your office earlier than you used to before you got hurt? A. Yes, sir.

Q. Do you take as many cases in the hospitals now, and for the past 18 months, can you handle as many as you could before you got injured?

A. Oh, no, I can't do near the amount of work I could. I just can't do it.

Q. What about in your office practice, and in taking care of patients?

A. When I have had a full day I am tired and my back hurts quite a bit. If I do any lifting I will have trouble.

Q. You go to bed about what time?

A. About eight o'clock.

Q. Prior to the injury what time did you go to bed?

A. We used to stay up and visit people. We haven't called on anybody since I have been hurt, I don't believe.

Q. Is that due to the way you feel? [134]

A. Yes, sir.

Mr. Kouri: May we have a half moment, your Honor, please?

(Testimony of Dr. Robert L. Hargrave.)

(At this time there was a very brief recess)

Mr. Kouri: I believe that will be all. Mr. Blewett you may have the witness.

Cross Examination

Q. (By Mr. Blewett): Dr. Hargrave, I understand that you returned to Wichita Falls about 1946 or 1947?

A. Yes, sir, in the Fall of 1946.

Q. And you practiced there ever since that time?

A. Yes, sir, I have had an office there ever since that time.

Q. Have you ever practiced medicine in any other town other than where your army duty took you?

A. Well, I was—like I say, I was in the Veterans Administration a little while.

Q. Other than that, Doctor?

A. Yes, I practiced in Corpus Christi, after I originally went to Wichita Falls, and I stayed down there about a year or so and came back to Wichita Falls, Corpus Christi, Texas.

Q. What type of work did you do at Corpus Christi?

A. I went down there to do surgery. [135]

Q. About when was that, Doctor?

A. I think that was about 1935, maybe '36.

Q. Now in Wichita Falls, Texas, where you now maintain your home, I understand there is a population of what, around 120,000 or 110,000?

A. Probably so, over 100,000.

(Testimony of Dr. Robert L. Hargrave.)

Q. I believe you told me on your deposition, down in Texas, that part of the reason for your drop in income was due to the addition of new Doctors in town, didn't you?

A. I said it could be.

Q. That there was about an increase of twenty-five per cent of new Doctors in town?

A. I have checked that since I gave my deposition. I can give the exact figures, how many Doctors were there in various years.

Q. Well, what is approximately the increase in the number of Doctors?

A. Well, I have it here.

Q. I am willing to take your recollection on it, Doctor?

A. I do not know. I can read it off. I have it right here. In 1950—these are Doctors that are members of Wichita County Medical Society. In 1950 there were 100 Doctors. In 1953, 109 Doctors. In 1956, 121 Doctors. And in 1959 there were 126 Doctors.

Q. In 1956 there were 121 Doctors? [136]

A. Yes, sir.

Q. As compared with 109 the year before?

A. No, sir, three years before.

Q. Three years before? A. Yes, sir.

Q. And in 1950, 106 is it?

A. In 1950 there were 106. In 1953 there were 109. In 1956 with 121. And 1959 there were 126.

Q. There is approximately a twenty-six per cent

(Testimony of Dr. Robert L. Hargrave.)

increase then, isn't that correct, from 1959 over 1950, according to this?

A. From 1950 to the present there is a twenty-six per cent increase.

Q. And that is pretty close to what you estimated when you and I were taking your deposition in Texas?

A. Yes, but I gave it wrong. I said about thirty, and you asked me since 1956 on the deposition, but I understood you to really say from 1946, so I guessed about thirty Doctors.

Q. How many were there in 1946?

A. I do not know.

Q. But there has been about a twenty-six per cent increase in medical practitioners in your city since 1950? A. Yes, sir.

Q. And I think, as I say, you admitted that might have affected your earnings? [137]

A. That might have been some factor, yes, sir.

Q. Now, Doctor, do the X-rays that you have herein Court with you—you say you have seen them all yourself? Do I understand you correctly?

A. Yes, sir.

Q. And that you are going to produce them in Court here, is that what you said on the witness stand? A. I never said that.

Mr. Blewett: Well, maybe Mr. Kouri said that.

Mr. Kouri: I made the statement and they will be introduced properly by one who took them, under his direction and control. I am willing for them all to go in if you have no objection.

(Testimony of Dr. Robert L. Hargrave.)

(At this time there was discussion between counsel regarding putting the X-rays into evidence.)

Q. (By Mr. Blewett): Dr. Hargrave, have you taken those X-rays to any local Doctor and had any local radiologist look them over with the idea that he will present them and interpret them for you?

Mr. Kouri: I object to that as being immaterial and irrelevant.

The Court: Objection sustained.

Mr. Blewett: May I have just a moment?

The Court: It is about time for a recess. Court will be in recess until ten to four. [138] (jury admonished) 3:55 P.M.

(Whereupon at 4:10 P.M. court was resumed, pursuant to recess, at which time plaintiff, defendant, all counsel and all members of the jury were present.)

Further Cross Examination

Q. (By Mr. Blewett): Doctor, getting to the condition in your back which you complain of in the 10th dorsal, you have defined it here as a compression fracture of that vertebrae, haven't you?

A. Yes, sir.

Q. And you testified you saw X-rays which showed it to be a fracture? A. Yes, sir.

Q. Doctor, it is a fact, isn't it, that people have compression fractures and don't even know it?

A. That is correct.

Q. That is right, isn't it? A. Yes, sir.

Q. And the first time they ever become aware

(Testimony of Dr. Robert L. Hargrave.)

of it is in the course of an X-ray their Doctor calls their attention to it? A. Yes, sir.

Q. In fact, that isn't uncommon, is it?

A. Well, it occurs. I do not know how often.

Q. Well, I am sorry, you aren't an orthopedic man. You don't do too much orthopedic work, do you? A. Yes, I do orthopedic work. [139]

Q. I understood you to say, Doctor, you referred orthopedic cases to Dr. Van Deventer?

A. I did not say that.

Q. What did you say in that regard?

A. I don't remember any question in that regard.

Mr. Kouri: I object to that as misquoting the testimony. He asked that of Dr. Van Deventer.

Q. You were present when Dr. Van Deventer testified to that, weren't you, that you had referred cases to him?

A. Yes, two or three cases he said.

Q. I am sorry. I knew it took place. Now you testified that you saw Dr. Maxfield. Dr. Maxfield did not treat you, did he?

A. He told me to take pills and stay in bed.

Q. You never consulted him for actual treatment in your case, did you? A. I saw him.

Q. Didn't you see him at Bethania Hospital one day? A. Yes, and at his office later on.

Q. And he prescribed pills? Did he prescribe anything else?

A. Yes, he said to take exercises. He did not outline any exercises. He said take exercises.

(Testimony of Dr. Robert L. Hargrave.)

Q. Was that the same type of exercise Dr. Wickstrom prescribed? [140]

A. He did not say what kind to take. He said take exercises.

Q. Well, other than the exercises which Doctor Wickstrom prescribed, was there any other treatment that Wickstrom or any other Doctor prescribed for you?

A. No, sir, except at first there. I would say no, no other treatment.

Q. Now in serious cases of compression fractures there are certain types of treatment that are employed, aren't they?

A. Am I qualified as an expert witness now?

Q. I am perfectly willing to leave that to your judgment Doctor.

Q. Would you repeat the question please?

Q. I say, where you have a serious compression fracture there are certain types of treatments that have to do with extension, isn't that right?

A. Yes, sir, in certain cases.

Q. That is right. Now at the time you visited Dr. Wickstrom did you go down there to see Dr. Wickstrom for your back or did you go down there to visit with your son?

A. I went down there to see about my back. The reason I went down there was I had a second X-ray made at the Bethania Hospital about a month after the first X-ray was made, and to me it showed an increase in the compression of the fracture.

(Testimony of Dr. Robert L. Hargrave.)

Q. Well, you visited with your son while you were there, [141] there is no doubt, didn't you?

A. Well, yes.

Q. Now is there any Doctor locally in Wichita Falls other than Maxfield who examined you, other than Dr. Van Deventer, whom you have identified today?

A. That examined me or treated me?

Q. No other Doctor?

A. No, sir.

Q. Dr. Van Deventer didn't treat you, did he?

A. No, sir.

Q. Now I will ask you, Doctor, if at the time of taking your deposition I did not ask you this question: "Why did you go to Dr. Wickstrom, any personal reason?" to which you answered: "No, I never knew Dr. Wickstrom. My boy was in New Orleans. He was a medical student in New Orleans and working with Dr. Wickstrom, as a medical student." Do you remember giving that answer?

A. Yes, I gave that answer.

Q. I thought I just asked you if you had any personal reason for going to Dr. Wickstrom. I thought you said no. In your deposition you said you went because your boy was in New Orleans?

A. I do not know whether that is a personal reason or not.

Mr. Kouri: What page, counsel?

Mr. Blewett: Page 14. [142]

Q. Doctor, getting back now to the office hours that you say you maintained, will you tell the Court and the jury at this time how and in what respect the office hours you have maintained since this acci-

(Testimony of Dr. Robert L. Hargrave.)

dent are different from the office hours that you maintained prior to this alleged accident?

A. Yes, sir, I close the office up earlier than I did before.

Q. How late did you keep the office open prior to the June 23, 1956, incident?

A. Five o'clock.

Q. And since that time how late do you keep it open?

A. About four thirty. Sometimes I go earlier.

Q. And other than that your hours are much the same? A. I would think so, yes, sir.

Q. You have your office in what building, Doctor? A. Hamilton Building.

Q. Is that the same building in which you have been officed since before the accident?

A. Yes, sir.

Q. As I recall that is quite a sizeable building, isn't it? It is a big building for a town that size?

A. It is eleven stories high, I think.

Q. Now getting back to the 23rd day of June, 1956, Doctor, would you be kind enough, at least for the moment, if I may hand you what is known as the Plaintiff's Exhibit #10, [143] I would like for you to look at it without the screen for a moment.

A. Yes, I can identify it. I know what it is.

Q. I believe you testified that that exhibit #10, was the last picture that you took on the way back, until you took the picture of the hotel itself, is that correct? A. Yes, sir, that is correct.

(Testimony of Dr. Robert L. Hargrave.)

Q. Now if you can, Doctor, state how far you were at the time you took this picture from the hotel itself? By "hotel" I mean the Many Glacier Hotel?

A. I think it would be between one-fourth and one-half mile.

Q. At the time you took that picture was the hotel visible to you? A. No, sir.

Q. Now, Doctor, I observe here in the Court room you wear glasses. I believe you told me that your eyes with those glasses are corrected to twenty-twenty vision, is that correct?

A. They might not be that good.

Q. What would you say they are?

A. My eyes have gotten worse since the injury.

Q. Your eyes have gotten worse?

A. Yes, sir, at the time of the injury my vision was twenty-twenty, but I really believe they have gotten worse. [144] It is probably twenty-thirty now.

Q. Have you worn glasses for a long time?

A. Yes, sir, I have worn these same glasses for years.

Q. And when did you last have your eyes checked?

A. I had my eyes checked about a year ago, maybe two years ago.

Q. And the same glasses were prescribed for you?

A. I have avoided getting new glasses because

(Testimony of Dr. Robert L. Hargrave.)

my accommodation is changing and I am avoiding getting new glasses until the accommodation becomes stationary because I will have to wear bifocals and if I change them I will just have to get new glasses at that time.

Q. At the point where you took that picture which is now identified as Plaintiff's #10, where were you at the time you took this picture with reference to the trail itself, Doctor?

A. I was on the trail.

Q. You were on the trail? A. Yes, sir.

Q. And do you know, Doctor, which direction the trail goes at that point where you took that picture?

A. The general direction is east, because that lake is to the north.

Q. Well, at the time you took the picture what direction would you be facing, if you know? [145]

A. Probably north. I do not know. I would have to see a map to see just what the direction is. I think the trail runs from the lake to the hotel, it runs in a general direction of northeast, and therefore that picture was taken in a direction of northwest. It was taken off the side.

Q. At the time you took that picture were you mounted on your horse? A. Yes, sir.

Q. And in what direction was your horse faced, so far as the Dillon horse and your daughter's horse are concerned?

A. Well, it was faced toward them. Is that what you mean?

(Testimony of Dr. Robert L. Hargrave.)

Q. Well, I don't think I have ever been on this trail, Doctor. I am asking you for my own edification.

A. What is the question again?

Q. At the time you took this picture in what direction was your horse faced so far as your daughter Ann and Mr. Dillon were concerned?

A. I can't answer that. I do not know.

Q. Well, was your horse faced in the same direction as they were going?

A. That is back toward the Hotel?

Q. Yes?

A. Yes, the horse was faced back toward the Hotel.

Q. And as far as you are concerned, how did you take [146] that picture, from what angle? Looking in the same direction you were going?

A. No, I said it was taken from the side of the horse. In other words, I shot the picture off from the side of the horse.

Q. You turned from the side of the horse?

A. Yes.

Q. To your right or to your left?

A. To my left.

Q. At the time you took this last picture, which we have identified as #10, what did you do after you had taken this picture?

A. Well, I went on. I do not know whether I stopped the horse to take the picture or not. I might have made the picture with the horse walking. After that the best of my memory was the

(Testimony of Dr. Robert L. Hargrave.)

horse continued to walk. And Dillon and my daughter were up in front.

Q. Well, your testimony is that you do not know whether the horse was stopped at the time this picture was taken?

A. Yes, sir, that is my testimony. I do not know whether I stopped the horse to take the last picture or not.

Q. Well, I am not too much of a photographer or horseback rider, Doctor, but can you take a picture as clear as that appears to be on a moving horse?

A. Yes, sir, you can. [147]

Q. What type of camera were you using?

A. A 35 millimeter.

Q. What make?

A. Contax, made by Zeiss.

Q. So at this time you do not know whether the horse was stopped or moving when this picture was taken?

A. That is correct.

Q. From this time forward, after you completed this picture, what did you do with your camera equipment?

A. Well, I kept the camera equipment—it was around my neck.

Q. Well, while you were taking this picture, Doctor, how many hands do you use with your camera taking a picture?

A. Two hands.

Q. Where were the reins of the horse?

A. I had the reins in my hands.

Q. You had the reins in your hands, Doctor?

A. Yes, sir.

(Testimony of Dr. Robert L. Hargrave.)

Q. Now after you took the picture, what did you do as far as the horse is concerned?

A. Well, I can't answer that, but if the horse was walking, well, he continued to walk, and if I did stop the horse, I started the horse up.

Q. Well, about how far from this point of this last picture did the horse walk from that point toward the riding post or the Hotel? [148]

A. Before—how far did he walk?

Q. Yes, sir?

A. I do not know. I don't remember exactly, but it was my recollection that there was more brush in front of us.

Q. Your recollection is now from the point where you took this picture on toward the Hotel there was more brush ahead of you?

A. Yes, because I could see Mr. Dillon and Ann going through some brush after I took that last picture.

Q. And at the time you took this last picture and immediately thereafter, how far was your daughter Ann ahead of you?

A. I don't recall how far she was ahead of me after I took the last picture, but when I saw them going through the brush in front, they were probably seventy-five feet ahead of me.

Q. And that would be right after you finished taking this last picture?

A. Yes, but I can't be positive about those points.

Q. Doctor, I don't expect you to be positive.

(Testimony of Dr. Robert L. Hargrave.)

A. It is hard to remember back two and a half years every little step.

Q. All I want you to do is give your best estimates. A. That is my best estimate.

Q. All I am trying to do is get the picture in my own [149] mind, and I have to do that so that I can ask you some questions. At the time you finished taking your picture which we have identified as #10, your daughter Ann and Mr. Dillon were within your sight? A. I believe so.

Q. And your best guess would be they were probably seventy-five feet in advance of you?

A. Yes, sir.

Q. Now what did your horse do at that time, if you can remember?

A. My horse was walking along.

Q. And about how far from that point forward did your horse continue to walk?

A. I do not know, I don't remember.

Q. Well, from your recollection of the trail at that point, would you be willing to give an estimate as to where your horse walked, whether or not your horse walked as far as Ann and Dillon were ahead of you at that time?

A. I do not know. I don't remember how far the horse walked, and I don't remember how long it was after I took the picture that I saw Ann and Mr. Dillon ahead of me.

Q. Well, do you have any recollection, Doctor, at this time as to how far Ann and Dillon might have

(Testimony of Dr. Robert L. Hargrave.)

traveled from the time you first saw them after the picture was taken until your horse started to run?

A. No, I can't say that. I do not know.

Q. Doctor, let's get at it from another way, if we can. Do you have in mind the point where you talked to Mr. Dillon after your horse finished the running you claim he did?

A. Yes, sir.

Q. How would you identify that?

A. I think that point was about one-fourth mile from the hotel.

Q. Were there any land marks at that point which would allow for identification of where you and Mr. Dillon discussed that situation?

A. When my horse did the running it was in the clear. There was no brush on the side of the trail at all. It was out in the clear where my horse did the running and the country was fairly level, say for about seventy-five yards, and then it seemed like there was a small dip in front from the point where my horse started to run.

Q. From the point where your horse started to run in the clear could you see the Hotel?

A. No, sir.

Q. Would the hotel have been in sight had you been looking for it?

A. No, sir.

Q. Well, from this point in the clearing where you say your horse started to run, did you from that point forward to [151] the hitching post or the hotel run into any other brush or timber along the trail?

A. I don't think so.

Q. So from the point where your horse started

(Testimony of Dr. Robert L. Hargrave.)

to run it is your recollection that the trail was clear?

A. I think so. The trail was clear, yes, sir.

Q. Doctor, just by way of illustration for the time being, and your Honor, I have borrowed this picture for this purpose and if it goes into evidence I would like permission to withdraw it. I would like to ask the Doctor if he can refresh his recollection from the photograph. At this time, Doctor, would you be able to note on that picture approximately where your horse was at the time of the running? Do you want to look at it?

A. To me it doesn't look right. Let's see, where is that picture. What direction is that picture taken?

Q. Doctor, I did not take the picture. If Mr. Kouri would let me testify I would explain it as best I can.

Mr. Kouri: We have no objection to your testifying.

Q. It is my impression that embraces the hotel and an area from the trail where you were approaching the hotel. This would be the clearing you were talking about.

A. The clearing here?

Q. Yes?

A. That was not that close to the hotel. This thing, [152] the hotel, of course, I do not know how this picture was made or where it was made from.

Q. It is the Glacier National Park picture.

A. I can't tell what direction it is.

Q. Maybe I will put that picture in.

(Testimony of Dr. Robert L. Hargrave.)

A. I would have to know what direction that picture was taken in.

Q. I will defer this for a minute and get back to it later.

A. I never observed the Hotel from that direction.

Q. Well, going back now to where you talked with Mr. Dillon, you were present in Court this morning, were you not, Doctor Hargrave, when Mr. Dillon testified to the fact that the road was there and available for you to walk back to the hotel?

A. I knew the road was there.

Q. I am just trying to get a land mark for you, that is all.

A. I knew it was there, yes.

Q. I am not saying you did not know it was there. At the point where you talked with Mr. Dillon where was the road that joins the trail on which you were riding or the one on which you would have walked back to the Hotel had you walked? Do you know? A. The road? [153]

Q. Yes, the road you just said you knew was there? Where was it?

A. Well, we were on a road I guess.

Q. Well, you were on a road or a trail, is that right? A. Yes, sir.

Q. Now at the time you talked with Blacky Dillon, according to Blacky you and he were talking at a point where the service road came up to the trail as I remember his testimony. Do you have any recollection on that?

(Testimony of Dr. Robert L. Hargrave.)

A. No, sir, I couldn't identify that place. I couldn't identify that. I did not see any trail there.

Q. Well, how would you identify the place by landmark as to where you and Mr. Dillon discussed this incident of your horse running?

A. That place was about between one-fourth and one-half mile from the hotel, I would say.

Q. By way of landmarks, Doctor, please tell me if you will whether there was any brush on the trail at that point, whether there was foliage or tall timber or small timber or what?

A. I couldn't possibly remember all that.

Q. Well, when you say it was in a clearing, was it absolutely clear from that point to the Hotel?

A. I believe it was, yes.

Q. And from that point to the Hotel what was the course [154] of the trail? Was it straight or was it a bending trail, or was it up hill and down hill or level?

A. It might have been up and down, and maybe curving some.

Q. When you say maybe, is that your best recollection?

A. I don't remember how it was exactly.

Q. Well, Doctor, on your direct examination I understood you to say that just before your horse started to run you came out of a brushy area, is that correct?

A. I said that possibly happened, yes, sir.

Q. And at that time you couldn't see Dillon or your daughter Ann?

(Testimony of Dr. Robert L. Hargrave.)

A. I only saw Dillon and my daughter Ann immediately before, a split second before or after my horse started to run.

Q. But you do not know whether it was before or after, do you?

A. I do not know, no. It was either before or after. Probably after.

Q. Now directing your attention again to your deposition which I took in Texas, Doctor, I will direct your attention to page 33, line 10, wherein I asked you, "Now just prior to that and before this horse that you were on started to run, did you see them then?" Answer: "No, I didn't see them take off and start to run. The reason I didn't, I think, was [155] because there were bushes there and you couldn't see." Is that your testimony at this trial?

A. Well, that is my opinion there probably were bushes there.

Q. But your testimony is that you never did see the horses run or them before you started to run?

A. Since I made that deposition I have had occasion to recollect this thing over, and my recollection might vary slightly with the deposition. I am telling it the way I see it right now at this moment.

Q. Well, going on with your deposition, Doctor, on page 33, I asked you again, when you first knew they were out in front of you or ahead of you, or else way ahead of you, and your answer was right after my horse started running. All I want, Doctor,

(Testimony of Dr. Robert L. Hargrave.)

is to know if that is your testimony now or whether your testimony upon this trial now is that you saw them before your horse started to run?

A. It was either after my horse started or a split second before. It was right at the time my horse started to run.

Q. Then you at no time saw your daughter or Dillon on a running horse until that time?

A. That is correct.

Q. And you at no time ever heard those horses run until when? [156]

A. I never did hear the horses run.

Q. Now, Doctor, would you describe to the Court and the jury here the action, if you can, of your horse when it started to run?

A. The horse was walking and it just started to run.

Q. Well, did it jump?

A. It just started to run, that is all I know.

Q. Was it trotting? A. Sir?

Q. Was it trotting? A. It was running.

Q. Well, Doctor, was it trotting or galloping or in a fast walk, or what?

Mr. Kouri: I object to that as being repetitious, your Honor. He answered the question twice that it was running. It is argumentative.

The Court: I think he might be permitted to inquire what he means by running, whether that includes trotting or galloping, I do not know. It should be limited to that.

Mr. Kouri: He has said it was running, your

(Testimony of Dr. Robert L. Hargrave.)

Honor. Your testimony is that the horse started to run? A. Yes.

Q. (By Mr. Blewett): Do you know whether the horse was trotting or galloping? [157]

A. To me it was running. It might have been galloping, that I do not know. To me, it was running. It seems to me like the horse just took off and started to run. The difference between galloping and trotting, you can't observe them with your eye, you can't determine that with your eye.

Q. I believe in your complaint you set forth that when the horse started to run he threw you forward?

Mr. Kouri: I don't believe the complaint has been offered in evidence. It is not evidence, the complaint or the answer.

The Court: What was the testimony on direct examination? Wasn't that to that effect?

Mr. Blewett: The testimony on direct went in he was bounced up and down in the saddle.

A. Yes, sir.

The Court: You may inquire just what did happen.

Q. (By Mr. Blewett): In your complaint, Doctor, you alleged that the horse threw you violently forward and flexed your back. Now what does "flexing" of the back mean, Doctor?

A. Well, the horse did not throw me violently forward and flex—like I said before, that complaint is drawn by my Attorney. I never made the statement that the horse violently threw me forward.

(Testimony of Dr. Robert L. Hargrave.)

Q. You did not tell that to your Attorney, is that it? [158]

A. No, sir, I didn't. He got that information from Dr. Wickstrom, and I never did tell Dr. Wickstrom that.

Q. Well, your testimony now is that the horse didn't throw you forward?

A. I never did testify the horse threw me forward.

Q. And you testify that you never told Dr. Wickstrom that? A. No, sir.

Q. And you never told your Attorney that?

A. No. The horse couldn't possibly throw you forward.

Q. Just answer me the question if you will, because it may come in later in the case. How is the body flexed? What is a flexion?

A. How is a flexion fracture caused?

Q. Doctor, I will rephrase my question, which is, how does a person flex his back?

A. He bends over forward.

Q. Now when this horse started running with you, Doctor, what if you can now recall did you first do when the horse first started to run?

A. Well, I tried to stop the horse.

Q. And how did you do that?

A. Pulled on the reins.

Q. Did you attempt to stand up in the stirrups or anything? [159]

A. I couldn't because I was back in the stirrups. When the horse took off he threw me off balance

(Testimony of Dr. Robert L. Hargrave.)

and my feet were in front and I couldn't get up on the stirrups.

Q. Your feet were in the stirrups at all times?

A. Yes, sir. I couldn't get the seat back. I couldn't stand up in the stirrups because I was thrown off balance.

Q. And how far in your opinion did your horse run from the time it first started to run until it stopped?

A. Well, it ran on down to where they were. I hollered and they stopped, and probably seventy-five yards.

Q. I believe you testified on direct examination, Doctor, that the horse took about three paces before you felt anything wrong, is that right?

A. Yes, sir, I think that is right, three or four.

Q. Do you now know what distance this horse would have covered in those three or four paces?

A. No, but he was going pretty fast. I do not know. I never tried to figure that out. I couldn't answer that.

Q. And what do you have to say, Doctor, as to the gait that the horse maintained? Was it the same speed from the time you started until you reached Blacky or did it vary?

A. Well, I do not know. He just started running. I presume it took some time to get going good, and I tried to stop the horse. I pulled on the reins. I couldn't get the horse to stop. [160]

Q. You mean it took him a little while to get started?

(Testimony of Dr. Robert L. Hargrave.)

A. Not very long. He just took right off. It had to give a little bit, maybe two or three steps to get started good.

Q. Did the horse rear or shy away?

A. No, sir.

Q. It just started from a walking to a running gait?

A. Yes, sir.

Q. And you at all times remained in the saddle with your feet in the stirrups?

A. Yes, sir.

Q. And I believe you said you had your hands on the reins?

A. Yes, sir.

Q. Did you at any time reach for the horn of the saddle?

A. I don't recall.

Q. Now when your horse reached the point where Blacky Dillon and your daughter were, which horse did it meet first?

A. I do not know, but I believe they were about abreast then, the two horses.

Q. And where did your horse come to a stop with reference to the two horses on which Dillon and your daughter were mounted?

A. It seems to me like my daughter's horse was to the right and Dillon's was to the left, although I can't be positive about that. [161]

Q. Where did your horse come to a stop?

A. It came to a stop there when they turned around. They started back. They stopped their horses and started back, and by that time my horse was up there to them.

The Court: It is about time to suspend for the afternoon. We will adjourn now until 9:30 tomor-

(Testimony of Dr. Robert L. Hargrave.)

row morning. (Jury admonished.) Court is now adjourned until 9:30 tomorrow morning. (4:55 P.M.) [162]

January 22, 1959 (9:30 A.M.)

The Court: You may proceed.

(Doctor Hargrave was recalled to the witness stand.)

Further Cross Examination

Q. (By Mr. Blewett): Doctor, just a few more questions to carry on from where we left off last night. You mentioned in response to some of the questions I asked you that your vision now isn't as good as it was, and I would like to direct your attention to the deposition which you gave, in which I asked you this question:

"Q. Do you know to what correction your eyes are with your glasses? A. My vision is good.

Q. Twenty-twenty, with glasses?

A. Yes, sir.

Q. And was it on that date? (Referring to the time of the accident.)

A. Yes, sir, my vision is good."

Now have your eyes changed in the last two weeks, Doctor?

A. No, sir. They might have a little bit, but not much though.

Q. Now, Doctor, getting back to the last pic-

(Testimony of Dr. Robert L. Hargrave.)

ture which you took, you said that you had a Con-tax camera? A. Yes, sir. [163]

Q. And is that the type of camera that you hold up in front of your eyes? A. Yes, sir.

Q. And is that the position in which you were holding the camera and reins on that horse when you took that last picture? A. Yes, sir.

Q. I understand, Doctor, that from your testimony yesterday you can't recall whether or not your horse was actually stopped at any time while you were taking these pictures, is that right?

A. Yes, sir, I do not know whether the horse was stopped or whether he was walking.

Q. There is the possibility that you might have stopped the horse then to take the pictures, is that right?

A. No, sir, just the last picture.

Q. Just the last picture? A. Yes, sir.

Q. And do you feel that you did stop the horse to take that last picture?

A. I do not know, I might have stopped the horse.

Q. You might have? A. Yes.

Mr. Blewett: I think that is all. [164]

Redirect Examination

Q. (By Mr. Kouri): Doctor, just a few questions. Were you doing a lot of surgery before you went in the service? A. Yes, sir.

Q. Was a few, a little, or a lot of that referred from other Doctors to you?

(Testimony of Dr. Robert L. Hargrave.)

A. I was doing quite a bit.

Q. What you call referrals?

A. Yes, sir.

Q. And were you specializing in any special type of surgery at that time?

A. I was doing neck surgery at that time, thyroid surgery.

Q. Then what year did you go into the service?

A. 1942.

Q. Were you subjected to the draft?

A. I had to register for the draft.

Q. I mean were you drafted or did you volunteer?

A. No, sir, I went in. I got a commission as an officer.

Q. You volunteered? A. Yes, sir.

Q. Now as you told us, and I am not trying to repeat, there was about a four year period you were in the medical department? [165]

Mr. Blewett: Your Honor, if I may at this time, I did not go into any of this on cross examination.

The Court: I can't see the purpose of it. Objection sustained.

Mr. Kouri: Very well.

Q. Did you observe the X-rays that were made of your spine after they were made?

A. Yes, sir.

Q. Were they made under your supervision with these other Doctors, the X-rays?

A. Yes, sir, except the ones at Teoro *Infirmity*.

(Testimony of Dr. Robert L. Hargrave.)

Q. That was——

A. At New Orleans, the first ones I had made at New Orleans.

Q. Would you step down please, Doctor, over here to where the jury can see. Doctor, those X-rays there, would you stand over this way, Doctor, and get those X-rays?

A. These are the first X-rays that were made.

Q. Who made these X-rays you are going to show?

A. These X-rays were made by Dr. Ane's technician in New Orleans.

Q. Would you please show them to the jury one by one?

A. This one was made in October 11, 1956.

Q. Would you please show it?

A. Yes. This is not the first one, but this is made [166] four months after the first one, and it shows a compression fracture of the 10th thoracic vertebrae.

Q. Did you measure those vertebrae in that thoracic area?

A. Yes, we have measured that repeatedly on the films.

Mr. Kouri: Let me offer this.

A. This was the last one made.

The Court: Don't you think that should be marked so that the record will be clear? It will be awfully confused otherwise. If you are going to use the other one, have that marked too.

Mr. Blewett: Doctor, would you mind telling me

(Testimony of Dr. Robert L. Hargrave.)

what P.13 is now? That is an X-ray taken on what date? A. October 11, 1956.

Mr. Blewett: By Ane you say? A. Yes.

Q. (By Mr. Kouri): And P. 14 was taken what date?

A. P. 14 was taken by Dr. Ane on August 4, 1958. In other words, they are almost two years different in the X-rays.

Q. That is Dr. Ane's too?

A. Yes, sir, and it shows—these films are about the same density, the vertebrae are, the ones above and below. This might be just a little denser, but they are just about the same exposure on the first X-ray picture that was taken. On the second X-ray picture at this point here (indicating) [167] you can see there is quite a bit more calcification at this point.

Q. At this point you pointed to P. 14 in comparison to P. 13 on that vertebrae?

A. Yes, it shows a decrease in the height of the vertebrae anteriorally; and there is some calcification around here that is more distinct than it was on previous films, which will be shown with Dr. Van Deventer's deposition. Now then, the picture that was made almost two years later shows a lot more density in the vertebrae. It is calcified. It is denser than this vertebrae here.

Mr. Blewett: Just a moment, Doctor. Will I be given the right to cross examine him on this?

The Court: Yes. This is really not strictly speaking re-direct examination. It is direct exam-

(Testimony of Dr. Robert L. Hargrave.)

ination. You will be given an opportunity to cross examine.

Mr. Blewett: Excuse me for interrupting, Doctor.

A. That is all right. And this shows here on (which the edge is calcified in this X-ray film it shows that is being destroyed, obliterated, rather than here. So this one here indicates a healing process over this, and also this flat on the bottom of this vertebrae, this P. 13, is less dense than this. To me this indicates a healing fracture, because in two years there is quite a bit more calcification than one would expect in a normal person, and then that is confined to [168] this vertebrae, as compared to the other vertebrae. In addition there is apparently some narrowing of the space between the 10th and 11th vertebrae.

Q. Can a compression fracture cause narrowing of that space? A. Yes, sir.

Q. What is that space called?

A. That is an intervertebral space.

Q. Is it called the disc area?

A. Well, the disc is in this space. This embryologically, your whole spine is developed as one piece, and then it differentiates out into different segments. In other words, different segments become calcified and in the part in between is cartilage.

Q. Doctor, let me ask you this. Is that narrowing of the space in between you say vertebrae 10 and 11? A. Yes, sir.

(Testimony of Dr. Robert L. Hargrave.)

Q. If it is narrow that way, what does that mean say with regard to the future? Would through nature the thing expand and get back to normal, or is that possible?

A. No, I think that is a permanent condition.

Q. A permanent condition?

A. In other words, I don't believe that will change any.

Q. Could the condition you have described there result in a rupture of that disc?

Mr. Blewett: That is a leading question. [169]

Mr. Kouri: I withdraw the question. Doctor, if you will please, we will set these aside. We offer them in evidence, Mr. Blewett.

Mr. Blewett: Your Honor, I think they have all been stipulated, all the X-rays he presents will be, if he identifies them can go into evidence.

The Court: Plaintiff's 13 and 14 are received in evidence without objection.

(Whereupon Plaintiff's Exhibits #13 and #14, being X-rays, were admitted into evidence.)

Q. (By Mr. Kouri): Will you put to the shadow box Plaintiff's Exhibit #15?

A. This was taken by Dr. Ane on the same date as that first one we had before, on October 11, 1956. And this is not a direct lateral view or side view. It is an oblique view, and it shows at one point—you can't see it——

Q. But point it out there?

A. Right here it shows where the inferior bor-

(Testimony of Dr. Robert L. Hargrave.)

der of this vertebrae is broken through, and you can see the fracture line right through here (indicating). If you look you can see it here obliquely.

Q. Can you tell by looking at that light up there? A. Yes.

Mr. Kouri: We will pass that to the jury. We offer that in evidence. [170]

Mr. Blewett: No objection.

The Court: Plaintiff's #15 is received without objection.

(Whereupon Plaintiff's Exhibit #15, being an X-ray, was admitted into evidence.)

A. The measurements vary on the thing, but Dr. Ane's machine is set at a certain difference, it gives more accurate measurements.

Q. Where is that?

A. That is the ones I looked at. I know what they are. I can give you the measurements, but they are not made on the film. They all show the same, the ones Dr. Ane made.

Q. Show me the ones we want to use to show the narrowness.

A. They are not written on. They would be all the same. It is marked here what he measured. They would have to be measured out, but I know what they are.

Mr. Kouri: We offer #17 in evidence.

Mr. Blewett: May I ask you a question, has #16 been identified?

The Court: No, it has not.

(Testimony of Dr. Robert L. Hargrave.)

Mr. Kouri: No, we haven't offered it. #17 is offered in evidence.

The Court: #17 is received.

(Whereupon Plaintiff's Exhibit #17, being an X-ray, was admitted into evidence.) [171]

Q. (By Mr. Kouri): Now, Doctor, identify for the purpose of the record.

A. Yes, this is made by Dr. Ane. This is made on March 20, 1957.

Q. Yes, sir.

A. Now the measurements of these vertebrae on all of Dr. Ane's pictures have been constant, and we have measured them together and I know what they are. They are not marked on the film.

Q. Please tell us what the measurements are?

A. The measurement of the vertebrae above, between here and here (indicating) is 25 centimeters.

Q. You are pointing to #9?

A. Yes, the 9th thoracic.

Q. All right, what is the measurement of #10?

A. 10 is 20 centimeters.

Q. A difference of how many?

A. It would be a difference of 5. And #11 is 26 centimeters.

Q. You are now referring to thoracic vertebrae #10 that measures 20 centimeters?

A. Yes, this one measures 20. Thoracic 10 measures 20 and the one above measures 25, and the one below 26.

(Testimony of Dr. Robert L. Hargrave.)

Q. Are they all supposed to be about the same depth? [172]

A. No, sir, they get larger as the vertebrae go down.

Q. But would there be that much difference? What would cause that?

A. These vertebrae are decreasing in size. They would be smaller, but the increase in size as one goes down, so that if this one is 25 and the one below would be 26, one would expect the one in the middle to be between 25 and 26, which would be 25½ about.

Q. Let me ask you this. Could that be a congenital condition? That is, born that way?

A. I know that is not it, because I have reason to know that I wasn't born that way, because I have seen—I saw a picture of my back in that same region in 1950 and it showed nothing like that at all. It was normal.

Q. When you got out of the service, of course, tell us about did you have anything regarding that?

A. They did not X-ray my thoracic spine.

Mr. Kouri: We offered I believe #17?

The Court: It has been received.

Q. Are there any more you think would shed any light?

A. No, I think they are all about the same.

(At this time Dr. Hargrave resumed the witness stand.)

Mr. Kouri: I believe that is all. [173]

(Testimony of Dr. Robert L. Hargrave.)

Recross Examination

Q. (By Mr. Blewett): Dr. Hargrave, maybe I misunderstood your answer you just gave, but you said in 1950 your back was normal. Did I understand you correctly?

A. Yes, sir. I mean the thoracic part of my back was normal.

Q. I was going to say, you have scoliosis, don't you? A. Yes.

Q. For the sake of the jury, that is curvature?

A. Yes.

Q. You have a hollow back too, don't you?

A. I do not know whether I have one or not.

Q. Do you know what a hollow back is, Doctor?

A. Yes, it is lardosis.

Q. You say you do not know whether you have one or not?

A. No. Everybody has a little bit.

Q. Pardon?

A. Everyone has some lardosis.

Q. Well, scoliosis is curvature of the spine, isn't it? A. That is correct.

Q. And a lardosis is what?

A. An anterior curvature.

Q. Like that (indicating)? A. Yes. [174]

Q. And scoliosis goes like that (indicating)?

A. Scoliosis is lateral curvature.

Q. Doctor, I understand the first X-rays taken of your back following this accident were taken at

(Testimony of Dr. Robert L. Hargrave.)

Bethania Hospital, in Wichita Falls, isn't that correct? A. Yes.

Q. And on what date was the first X-ray taken?

A. On July 2nd.

Q. Would you get that X-ray please? Doctor, if it would be more convenient you can certainly get out of the chair and work at the table where it won't be so uncomfortable for you.

A. (Searches in X-rays) I will have to go over there and go through all of them and try to find it. Yes, sir, this one right here (hands to counsel).

Q. How many X-rays were taken on that day, Doctor?

A. I believe two. There were a front and side picture. Do you want the front picture too?

Q. Let's just take a look at this one first.

A. That is technically not a very good picture.

Q. Doctor, we will show this to the jury in just a minute. I think it might speed it up if we take a look at it here. Will you tell me what portion of the spine this is, Doctor?

A. This is the lumbar portion. [175]

Q. Excuse me, I meant is this the anterior or posterior portion of the spine right there?

A. That is the anterior portion.

Q. And do you know who marked the X-rays here? A. No, sir.

Q. Well, from your looking at that X-ray, the vertebrae which is opposite the circle marked T 10 would be the 10th dorsal? A. That is right.

Q. And would you tell me, just looking at the

(Testimony of Dr. Robert L. Hargrave.)

edge of the vertebrae at the top there I believe what we call the superior and inferior surfaces, isn't that right? The top is the superior surface?

A. Yes.

Q. And the bottom is the inferior surface, is that correct? A. Yes, sir.

Q. Now tell me what that little prolongation or protrusion is on the anterior surface of T 10?

A. That is hypertrophic lipping.

Q. That is arthritis?

A. That is degenerative changes.

Q. This X-ray was taken on July 2, 1956?

A. Yes, sir, that is normal condition.

Q. That is normal condition? [176]

A. Yes, sir.

Q. Now, Doctor, take a look at the rest of the vertebrae in that picture and tell me in your opinion if the prolongation at T 10 is greater than it is on the other vertebrae?

A. That is right, but that is because that is the most flexible part of the spine. That is where the motion is more frequently.

Q. Your answer to that is there is more hypertrophic condition on T 10? A. Yes.

Q. This accident occurred on June 23rd, didn't it? A. Yes, sir.

Q. This X-ray was taken——

A. July 2nd.

Q. July 2nd, or about nine days later?

A. Yes, sir.

(Testimony of Dr. Robert L. Hargrave.)

Q. Would that hypertrophic condition that appears there have grown in nine days?

A. No, sir, that was there. That was there in 1950, but it was not as great as it was at this time.

Q. Then in 1950 you did not have a normal back, did you?

A. That is normal condition. I had scoliosis.

Q. And you had hypertrophic growth?

A. Yes, but the hypertrophic growth is normal.

Q. In 1950 you would have been about fifty years of age? [177]

A. No, sir.

Q. How old would you have been then?

A. Well, I am 54 now.

Q. In 1956 then you should have been about 51?

A. In 1950 you said.

The Court: 46 I think, is that right, Doctor.

A. I would be about 46.

Q. When you were 46 you are saying that the prolongation of hypertrophic spurs on T 10 was normal for a person 46 years of age, is that right?

A. I can't tell you about that particular vertebrae, but I can tell you about all of them, because I did not pay any special attention to that vertebrae at that time. I saw the X-rays of my back and it showed a little spurring throughout, which was considered normal.

Q. You can be seated if you care to.

A. (Resumes stand.)

Q. Will you now for a moment take any one of these other ones here—do you have a larger picture

(Testimony of Dr. Robert L. Hargrave.)

of your spine that was taken say two years after the accident, or this injury you claim?

A. Yes, there might be a larger one there.

Q. Maybe you can tell from one of these Doctor—take a look at Plaintiff's #14, which is the exhibit you introduced a few minutes ago, and then take a look at the exhibit that is [178] now under consideration?

The Court: Shouldn't that be identified? Has that been identified?

Mr. Blewett: I will offer in evidence Plaintiff's Exhibit #16, the X-ray.

Mr. Kouri: No objection.

The Court: The exhibit marked Plaintiff's Exhibit #16 is received without objection, offered by the Defendant.

(Whereupon Plaintiff's Exhibit #16, being an X-ray, was admitted into evidence.)

Q. (By Mr. Blewett): Are these the same views, Doctor?

A. Yes, sir. This picture here is not clear. It doesn't have the same exposure as this, and it is difficult to compare those—probably not exactly at the same angle.

Q. Well, Doctor, would you with a pencil—and, Doctor, let me ask you this question, and you can go on if you will. Will you show the jury here what you have identified as a hypertrophic spur in what is known as the thoracic or dorsal 10th vertebrae?

A. There is a spur here and here (indicating), spurs here and here.

(Testimony of Dr. Robert L. Hargrave.)

Q. Which of these spurs in your opinion are the more pronounced?

A. It looks like this is here between the 9th and 10th in front. [179]

Q. Right at what we call the superior surface of the 10th dorsal vertebrae, is that correct?

A. Yes. This other view taken two years after shows that is gone, so I can't put too much emphasis on that.

Q. That shows what?

A. That isn't present in this last picture.

Q. Two years later?

A. It must be a little variation in the angle of it.

Q. And that does make a difference in how the vertebrae looks, doesn't it, Doctor?

A. I think so, yes.

Q. Now, Doctor, you allege that as a result of this incident and the injury to your vertebrae, you have suffered hypertrophic spurring of the lumbar vertebrae, and particular around the lumber vertebrae #4. Now from your testimony here, I understand the only complaint you have had now since this incident has to do with the dorsal vertebrae?

A. Except the left foot. I have a burning pain in the bottom of my left foot.

Q. And you also allege that you had damage to the 10th and 11th dorsal spinus process. Now is there any damage to the spinal process there other than what you claim is a compression of the 10th dorsal?

(Testimony of Dr. Robert L. Hargrave.)

A. Spinal process? No, there is no injury to the spinus process. [180]

Q. Now, Doctor, have you had occasion to do much work with orthopedics such as is involved here? A. Well, some, yes.

Q. Have you had occasion to treat a compression fracture of the 10th dorsal vertebrae?

A. I do not know about that particular vertebrae, but I have treated fractures of the dorsal spine.

Q. Doctor, will you tell me whether or not in your opinion the degree of compression which you have described here would be considered minimal, mild or severe?

A. Well, I don't think it is minimal now.

Q. You would say it is mild?

A. I think it would be moderate. There is a decrease of about 20 per cent in the height of the vertebrae.

Q. That is in the range of what is called a mild compression, isn't it?

A. I wouldn't think so, not 20 per cent.

Q. Well, do you know, Doctor?

A. What?

Q. What is the range of compression that is embraced within the term "mild compression"?

A. No, I do not know.

Q. You do not know?

A. No, who embraces that?

Q. Well, I don't want to engage in an argument on that, [181] Doctor, I am just asking you if you

(Testimony of Dr. Robert L. Hargrave.)

know. Now, Doctor, you said something about that you were having some trouble in your right foot. Do you know whether or not there are any nerve connections or nerve endings that originate in the area of the dorsal vertebrae that lead to or are connected with the nerve endings in the lower extremities? A. Only through the spinal cord.

Q. Only through the spinal column?

A. Yes, sir.

Q. And isn't it a fact that, Doctor, the dorsal vertebrae are connected with the ribs?

A. Yes, the ribs are attached to them.

Q. And the radiation or sensation doesn't go from the dorsal area to the lower extremities does it? That originates in the lumber area, doesn't it?

A. Yes, sir.

Mr. Blewett: I believe that is all.

Further Redirect Examination

Q. (By Mr. Kouri): In view of that last question on recross examination, in the lumber area what nerve radiates down from that area down to the lower extremities, the legs?

Mr. Blewett: Just a moment. I understood the Doctor to testify he has had no trouble with his back area since 1950, [182] that the only trouble is in the dorsal area that he has. I just want it understood his main complaint, as I understand it from his testimony, is in the 10th and 11th dorsal vertebrae.

The Court: You may answer it.

(Testimony of Dr. Robert L. Hargrave.)

Q. What nerve radiates from the lower back down?

A. The sciatic nerve and its branches.

Q. If there is a pinching there in the lower part of that nerve would it cause any pain to radiate down the legs?

Mr. Blewett: I raise the same objection. There is no evidence in this case about that nerve there, no contention the lumbar area is involved.

Mr. Kouri: He has testified he has pain in the foot down there.

The Court: I will let him answer and see if it is connected up.

Q. The question was, if there is a pinching in the lumbar area, will it cause pain to radiate down to the legs, down to the toes even? A. Yes.

Q. This plastic model, I wish you would point to the jury and show them where the 10th thoracic vertebrae is?

A. You would have to start down here (indicating).

Q. Go from the bottom up? This is the lumbar?

A. This is lumbar vertebrae, 5, 4, 3, 2 — this would be the 12th thoracic, the 11th thoracic and the 10th thoracic. [183]

Q. And on?

A. And the 9th, and so on.

Q. What are these little wide things? What do they represent on this?

A. They represent the inter-vertebral discs.

Q. What substances are they made out of?

(Testimony of Dr. Robert L. Hargrave.)

A. They are made of cartilage, and in the middle of it is kind of jelly.

Mr. Kouri: Thank you, Doctor, I believe that is all.

Mr. Blewett: May I ask one more question.

The Court: You may.

Further Recross Examination

Q. (By Mr. Blewett): Doctor, I want to be sure, would you point out to the jury which is the anterior and which is the posterior portion of the spinal column. Did I ask you that, or did you have that on the box? A. You asked me here.

Q. May I use this model?

Mr. Kouri: Certainly, sir.

Q. Would you point out to the jury from the model?

The Court: It is just for illustrative purposes?

A. This is the front, of course, of the vertebrae.

Q. Directing your attention, Doctor, to a model skeleton [184] or a model of the vertebral area of the back, would you point out to the jury which is the anterior and which is the posterior portion of the spine?

A. Well, this is the front of the spine (indicating.)

Q. That is anterior, isn't it?

A. Yes, sir, and this is the posterior portion (indicating).

Q. And in connection with what portion of the spine is the spinal cord or column located?

(Testimony of Dr. Robert L. Hargrave.)

A. It is posterior to the vertebrae.

Q. It is posterior?

A. It is in this canal here (indicating).

Q. So it is posterior to the vertebrae?

A. Yes, sir, it is in the canal. There is a hole that goes through there. You can see through there.

Q. And the arthritic spurs you have pointed out are on the anterior portion, aren't they?

A. Yes, sir.

Q. Away from the spinal column or the cord?

A. Yes. There are probably some on the back too.

Q. There is no evidence in the X-rays?

A. There might be. I think there is. They are not pronounced.

Q. They are more pronounced away from the nerve center?

A. Yes, there is no nerve center up in front.

Mr. Blewett: I believe that is all, your Honor.

Mr. Kouri: That is all, Doctor.

(Witness excused.) [185]

Mr. Kouri: I have a short deposition, your Honor.

The Court: Very well, we will take that before the recess.

Mr. Kouri: I would like to tell the jury we will read the deposition of Mrs. R. G. Ryan, which was taken before a duly authorized Court Reporter in Wichita Falls, Texas, where I appeared as Attorney for the plaintiff, and Mr. Alex Blewett, Jr., as At-

torney for the defendant, and the deposition was taken on the 5th of January, 1959. Mr. Bretz will read the questions and I will read the answers.

Mr. Blewett: Unless you wish to read it in, I am willing it go in.

Mr. Kouri: We want to present our case.

The Court: I take it there are no objections?

Mr. Blewett: No, your Honor.

The Court: You may use this copy.

(Whereupon Mr. Bretz and Mr. Kouri read the deposition of Mrs. R. G. Ryan, as follows:)

DEPOSITION OF MRS. R. G. RYAN

Direct Examination

“Q. (By Mr. Kouri): Please state your name to the court and jury? A. Mrs. R. G. Ryan.

Q. Where do you live, Mrs. Ryan?

A. 1822 Huff.

Q. What city? [186]

A. Wichita Falls, Texas.

Q. How long have you lived in Wichita Falls?

A. Close to ten years.

Q. Are you in business yourself, or are you a home maker? A. I'm a home maker.

Q. What does your husband do?

A. He is a geologist.

Q. What particular type of geological work does he do?

A. He is a consulting geologist and also a professor at Midwestern University.

(Deposition of Mrs. R. G. Ryan.)

Q. Is Midwestern University located in Wichita Falls? A. It is.

Q. Do you know the plaintiff, Dr. Robert Hargrave? A. I do.

Q. How long have you known him?

A. Since we moved here, around ten years.

Q. You are his next-door neighbor?

A. Yes.

Q. You know Mrs. Hargrave and the rest of the family? A. Yes.

Q. You visit one another like most neighbors?

A. Yes.

Q. Are you related to the Hargraves in any way? A. Not at all.

Q. Did you and your husband and other members of your [187] family take a vacation in June of 1956?

A. Yes, we went on quite an extended trip at that time.

Q. Did you go to the State of Montana?

A. We did, in route to Canada.

Q. What time did you leave home?

A. I can't say exactly; I think it was between June 5th and June 10th. I have the record.

Q. Who went along?

A. I can't give you all the names of our party.

Q. Just your family.

A. My husband and daughter and myself.

Q. Did you drive? A. We drove.

Q. Do you recall approximately how long it took you to get to Montana?

(Deposition of Mrs. R. G. Ryan.)

A. Well, it took us approximately three weeks because we were touring with thirteen others and conducting a geological tour.

Q. Mrs. Ryan, do you recall when you reached Montana seeing the Hargraves up there?

A. We did, we met them at Glacier National Park, quite by accident. We were parking our car and drew up behind a car that had the same license number as Dr. Hargrave's. We noticed the license plate because it was our home State license number and I compared it with the license number of his car [188] and it was his car. We left a note on the steering wheel telling them that we were also there and they later hunted us up.

Q. Did you stay at the same hotel?

A. No, I was staying at this camp ground with this group.

Q. How many days was it after you left the message in the car until they looked you up?

A. That was the same day.

Q. Who looked you up?

A. Dr. Hargrave and his wife and Ann.

Q. Of course, you were glad to see each other?

A. Yes.

Q. Later, did you and the Hargrave family have occasion to go to the same show?

A. We might have, if the doctor had been feeling up to par.

Q. Did you plan to go to anything particularly?

A. No, they were made on the spot, just ran into

(Deposition of Mrs. R. G. Ryan.)

each other quite by accident and he later looked us up at Swift Current Camp ground.

Q. On a particular evening were plans made to go out, you and the Hargraves?

A. After the Hargraves and myself met at the camp ground, they stayed a few minutes to see the set up and of [189] course the doctor was not feeling well so I said there was a motel and a nice place to eat across the road from our camp ground. They went across there and didn't know whether they were going to stay or go on, depending on how Doc felt and the accommodations that they found. We decided that it would be fun to go to the lecture held in the Many Glacier Hotel, I think, under that ranger plan. It came time to go and it was getting late and I became concerned. They had said if they decided to go on, they would mention it to me and if they did not go on, we were to go to the lecture. I became concerned when it got after supper time and I went across to the motel which I referred to previously.

Mr. Blewett: I don't mean to interrupt you, but I understood you to say something about "records" and I don't know what you are talking about.

A. I looked through my accounts—I kept track of the food for all of the group and I found my expenses at Swift Current Camp ground fell on June the 23rd and I was there June the 23rd and 24th, that I know of, before I went on.

Q. Now getting back to your concern for Dr. Hargrave, what day was that?

(Deposition of Mrs. R. G. Ryan.)

A. I think that was on June the 23rd.

Q. All right, go ahead from there, on the 23rd.

A. I went across to the Motel and asked at the desk where the Hargraves were located, if they were there, and they [190] said they were there and I went around to their cabin and Doc was in bed. Mrs. Hargrave came to the door and said it would be impossible for her to go to the lecture and that she didn't want to leave Doc to come down and tell me. I stepped inside the door and——

Q. Could you tell if they had a phone there in the lodge or not?

A. I don't know whether they did or not.

Q. Mrs. Hargrave told you that was the reason she was staying there with Dr. Hargrave, that he was in bed?

A. Yes.

Q. Did he relate to you what happened to him?

A. Yes, said that he had hurt himself on a horse.

Q. Did he say where?

A. Near Josephine Lake. I understood it was a horse trail.

Q. Was Dr. Hargrave undressed, I mean, did he have his night clothes on?

A. He was in bed. He wasn't pleased to see anyone.

Q. You observed the expression on his face?

A. He was in pain.

Q. You could tell that by observation?

A. That's right.

Q. After that, did you attend the lecture?

(Deposition of Mrs. R. G. Ryan.)

A. I did go to the lecture but I didn't come back by over there. [191]

Q. Was that the last time you saw them?

A. It was.

Q. When did you all get back to Texas?

A. It was after July 5th, I think, or the 7th.

Q. Have you had occasion to visit them here off and on, the Hargraves? A. Yes.

Q. And they visit with you? A. Yes.

Q. Confining your testimony to before June 23rd, did you have occasion to observe Dr. Hargrave coming and going from the house?

A. Yes.

Q. Is he your doctor? A. He is.

Q. Have you had occasion to observe him before June the 23rd at his office, or did you call him to see any of your family?

A. I don't think I have called him—what date are you concerned with?

Q. Before June the 23rd, before you went on the trip.

A. I did see Dr. Hargrave several days before we went on the trip. He studied my itinerary and I studied his and he took off before I did which is why I had his license number in case we did cross paths, and he was in fine condition then. [192]

Q. Well, my question is this: From all those observations prior to June the 23rd did you notice anything abnormal in the way he walked or the way he stepped, sat down and got up?

A. No, I didn't.

(Deposition of Mrs. R. G. Ryan.)

Q. Now, concerning your observations after June the 23rd, after you got back home to Texas, did you have occasion to observe him very much, going from the house?

A. Well I do know after they came back he was laid up and I think he made a trip to New Orleans concerning his back trouble.

Q. You did observe him then, quite a bit?

A. Yes.

Q. Coming and going. Was there very much of a difference in his walk and his manner of getting up and sitting down, comparing that to before, what did you observe?

A. Well, I would say there was a slight slowing down and stooping but I had no occasion to observe any other matter.

Q. You observed a slowing down and stooping?

A. Yes."

Mr. Kouri: Then there is the offering of the exhibits which will be shown to the jury later. They offered the exhibits. Now down to the question, line 23:

"Q. Prior to my meeting you today, it is the first time you ever met me? [193]

A. No, I believe not. I think I have met you on the street somewhere.

Q. Probably so, but have I ever talked to you about this case? A. No.

Q. Until today?

A. No, other than summon me here.

Mr. Kouri: "Thank you, Mrs. Ryan." And it is signed and sworn to before the notary. We would like to offer and show the Plaintiff's Exhibits #1 and #2 on this deposition.

Mr. Blewett: I think by stipulation the exhibits ought to be identified a little different.

The Court: I think whatever the next number is.

Mr. Blewett: I am willing to stipulate that the exhibits be modified by number as it appears in the deposition.

The Court: What would the next number be?

(Plaintiff's Exhibit #18 and #19 were marked for identification, being Exhibits #1 and #2 from the deposition.)

The Court: Plaintiff's Exhibits #18 and #19 are received in evidence without objection.

(Whereupon Exhibits #18 and #19 being records of Mrs. Ryan, were received into evidence.)

The Court: We will take a fifteen minute recess at this time. (Jury admonished.) Court is now in recess until 10:45. (10:30 A.M.) [194]

(Whereupon at 10:45 A.M. court was resumed, pursuant to recess, at which time plaintiff, defendant, all counsel and all members of the jury were present.)

Mr. Kouri: May we proceed.

The Court: You may proceed.

Mr. Kouri: We will call Ann Hargrave.

ANN HARGRAVE

having been duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Kouri): Please state your name to the Court and jury.

A. Ann Hargrave.

Q. Ann, can you hold your voice up so that we can all hear you? A. Yes.

Q. Ann, where do you live?

A. I live in Wichita Falls, Texas.

Q. Are you related to the plaintiff, Dr. Hargrave? A. Yes, sir.

Q. You are his daughter? A. Yes, sir.

Q. Ann, do you recall back in the early part of June, the first part of it, I will say, about a plan for a trip you and your mother and father had talked about? A. Yes, sir, I do. [195]

Q. What about that trip, where had you planned to go?

A. We planned to go up through the Yellowstone National Park and Glacier National Park and up through Canada and back.

Q. And do you recall talking the matter of your itinerary over and such? A. Yes, I do.

Q. Were you ever present with your father and mother or both, when they discussed this with Mr. and Mrs. Ryan that lived next door?

A. Yes, sir, I remember.

Q. How long have the Ryans been neighbors?

A. I imagine about ten or eleven years.

(Testimony of Ann Hargrave.)

Q. I see. Now when you all left, you and your mother and father were on the trip? A. Yes.

Q. What kind of car did you all have?

A. We had a green Chrysler.

Q. And do you recall approximately what part of the month that you left? A. In June.

Q. Do you recall?

A. It was the latter part of June.

Q. Then you went on up north? A. Yes.

Q. Do you recall coming into Yellowstone? [196]

A. Yes, sir, I remember.

Q. Do you remember how many days it took you to get to Yellowstone? I know it has been some time ago, and your best estimate will be all right I believe.

A. I would say maybe two and a half or three days.

Q. How long did you stay at Yellowstone?

A. Not very long.

Q. Then did you go on up north?

A. Yes, sir, we did.

Q. What was the next stop, of any time? Well, if you don't recall, did you go on up into Canada?

A. Yes, we did.

Q. And in what part of Canada were you visiting?

A. We went to British Columbia and around Banff and Lake Louise.

Q. How long did you stay, approximately?

A. It was bad weather and you couldn't travel

(Testimony of Ann Hargrave.)

or see too much. I think we stayed around four days, I will say.

Q. Then after that did you all start on the way back? A. Yes, sir, we did.

Q. All right, then did you come into the Glacier National Park area? A. Yes, sir.

Q. And approximately what time during the month of June was this when you came into that particular area? [197]

A. It was the latter part.

Q. The latter part? A. Yes.

Q. Then where did you stop? Were you at Many Glacier Park area? A. Yes.

Q. And did you and your mother and father make a stop there? A. Yes, we did.

Q. Were you present with your parents when there was some message left on the steering wheel of the car? A. Yes, I was.

Q. Did you see that message?

A. I do not know if I found it or if mother did. It was from the Ryans.

Q. From the Ryans? A. Yes.

Q. And they left word they would like to see you? A. Yes.

Q. Did you go over and see them?

A. Yes, we did. We went to their camp.

Q. And how long did you spend with the Ryans there?

A. Well, at their camp we did not stay very long I don't think. We just visited with them for a little while and then we left. [198]

(Testimony of Ann Hargrave.)

Q. Then you left? A. Yes.

Q. Was there any discussion, not what anyone said, about whether or not you might stay or go on back to Texas, or do you recall that?

A. I don't recall.

Q. All right, Ann. Then after you left the Ryans there at their camp, where did you and your mother and father go? Where did you all drive to? Do you know where you went?

A. I can't remember if it was back to the motel.

Q. What time was that when you saw the Ryans? Was it in the morning or afternoon?

A. I think it was around lunch time.

Q. And then did you and your father go up to the Many Glacier Hotel? A. Yes, we did.

Q. And was your mother with you?

A. Well, she did not go with us.

Q. Did you all drive up in the car?

A. Yes.

Q. And did you park the car? A. Yes.

Q. And your mother, what did she do?

A. I do not know if she stayed in the car or whether she went to the hotel and sat down in the lobby. [199]

Q. She did not go with you and your dad?

A. No.

Q. Did you and your father get out of the car and go up to the area where they have the horses?

A. Yes, Mr. Kouri.

Q. And who did you see there?

(Testimony of Ann Hargrave.)

A. We saw Mr. Dillon about taking a little tour up to Josephine Lake.

Q. Did you know his name at the time?

A. No, I didn't.

Q. Did he introduce himself? A. Yes.

Q. He told you his name? A. Yes.

Q. What did he say? A. Blacky.

Q. He said his name was Blacky Dillon?

A. Yes, sir.

Q. You have seen him here during this trial?

A. Yes.

Q. Is that the same man that you saw?

A. Yes.

Q. Did your father introduce himself?

A. Yes.

Q. And were there inquiries made about obtaining some horses? [200]

A. Yes, there were.

Q. As you said, to go to Josephine Lake?

A. Yes.

Q. Incidentally, had you read the article in the National Geographic Magazine about that same area? Had you seen it, or do you recall?

A. Before the trip?

Q. Before the trip, yes.

A. It seems as though I heard my daddy talking something about it.

Q. Blacky then went to get the horses for you?

A. Yes.

Q. And how far away were you all from him when he went to get the mounts?

(Testimony of Ann Hargrave.)

A. Well, we were right there with him. We were close to him.

Q. Could you see very many horses there?

A. Yes.

Q. Were very many of them saddled?

A. Most of them were saddled, yes.

Q. Was there any discussion about the regular trip, and about your father telling Mr. Dillon, well, we would like to go now to take the pictures?

A. Yes, I remember that.

Q. All right, whose horse did Mr. Dillon obtain first, [201] yours or your father's or what?

A. I don't recall, sir.

Q. Did he obtain a horse for you? Did he go get a horse for you and say this is your horse, or was there some other horse brought back?

A. I don't recall, sir.

Q. You don't recall? A. No.

Q. Do you recall what color your horse was?

A. It was a brown horse.

Q. And did you mount your horse?

A. Yes, sir.

Q. You have ridden before? A. Yes.

Q. Then did Mr. Dillon mount his horse?

A. Yes.

Q. And your father? A. Yes.

Q. And so you all then rode on toward the trail, is that right? A. Yes, sir.

Q. Who was in the lead? A. Mr. Dillon.

Q. Who was next? A. I was. [202]

Q. And who after you? A. My father.

(Testimony of Ann Hargrave.)

Q. Now that area leaving there from the hitching post, is the road wider there?

A. Yes, sir, I believe it was.

Q. And then later you came to what, foliage?

A. Yes, sir, it was quite thick in there. It was just like a forest with trees.

Q. My question is, about how much in distance would you say, your estimate, it was from the hitching post to where you began to see foliage and trees and forest?

A. Oh, I would say it was about one-fourth of the way.

Q. I see. The whole distance to it would you estimate was about how far, if you recall? To the lake I mean?

A. Oh, I would say maybe a mile and a half, I couldn't really say.

Q. All right. So you all went on, and what pace were you all going?

A. We were walking very very slowly.

Q. How far apart were you, the horses?

A. Well, it varied. Sometimes Mr. Dillon would be a little bit in front of me and then I would move up a little bit and then daddy would be a little further behind. I believe he was always a little further behind, but it would vary between Mr. Dillon and myself. [203]

Q. Did Dillon tell you before you left that his horse was to be the lead horse and you all were to stay behind, or was anything said about that?

(Testimony of Ann Hargrave.)

Mr. Blewett: I object to a leading question like that.

Mr. Kouri: I will withdraw that.

The Court: I think that is true of all the preliminaries, the leading questions were proper, but if you will not now.

Mr. Kouri: Thank you, sir.

Q. Did Mr. Dillon state anything to you before you left in the way of giving you any instructions?

A. No, sir, I don't remember.

Q. Going on up the trip, did anything unusual happen going up with reference to your father?

A. Yes, sir, he dropped a little package of his film.

Q. And how far in front were you ahead of him, or were you to the side of him, or what? In other words, how did you know about it?

A. I believe he said something about it.

Q. Where were you? What was your position then? Who was in front of whom?

A. Mr. Dillon was always in the lead.

Q. With reference to you and your father?

A. I was second and my father was last. [204]

Q. The film was dropped and what did you do?

A. I got off my horse and picked it up and gave it to him.

Q. Did you have any difficulty?

A. No, sir, I didn't.

Q. What did you do after you picked it up and gave it to him?

A. Well, we started.

Q. And continued on?

A. Yes, sir.

(Testimony of Ann Hargrave.)

Q. Without any other incident until you got to the lake? A. Yes, sir.

Q. All right, we are at the lake. Of course, were you enjoying the scenery and everything?

A. Yes, sir.

Q. It was quite beautiful, wasn't it?

A. Yes, sir.

Q. Now, Ann, when you got to the lake what did you do then? Did you all stop?

A. Yes, we stopped for around I would say maybe fifteen or twenty minutes.

Q. Do you recall whether you got off your mount or not? A. I don't remember.

Q. Do you recall anything about what your father did with the camera? [205]

A. Yes, he took some pictures I think, maybe two pictures of me on my horse at the lake.

Q. I see. And did you see your father talking to Mr. Dillon?

A. No, sir, because I rode around a little on my horse.

Q. You rode around? A. Yes.

Q. State whether or not they, Dr. Hargrave and Mr. Dillon, remained together or not?

A. Yes, they did. They stayed at the lake.

Q. And approximately what time was this, Ann, to the best of your recollection?

A. Well, I would say maybe between 11:30 and 12:30.

Q. Something like that? A. Yes.

(Testimony of Ann Hargrave.)

Q. You stayed there how many minutes, approximately? A. Maybe fifteen or twenty.

Q. Then who said something about well, let's go back, or let's return back, or did anyone say anything about let's go back, that you know of?

A. No, sir, I don't remember.

Q. Were you present then when your father attempted to mount his horse?

A. Yes, I was, and I believe he had a little trouble getting on it. [206]

Q. Please describe in your own words what you observed?

A. Well, I don't remember it too much, but he did have a little trouble, and I think the saddle slipped a little bit and Mr. Dillon had to push it back up and help him on his horse.

Q. Did Mr. Dillon do anything with reference to the cinch or taking it up, tightening it up? Did he do anything?

A. It seems as though he did, but I couldn't say for sure.

Q. State whether or not you saw your father at that moment, that particular occasion grabbing onto the horse's mane to help get on while Mr. Dillon was helping him, if you recall?

A. It seems as though he did. I know he grabbed hold of the saddle horn.

Q. Then you all started back? A. Yes.

Q. And how did you start off going back?

A. Mr. Dillon was in the lead, I was second, and my father last.

(Testimony of Ann Hargrave.)

Q. Now going back just a little Ann, would you tell us was that trail where you got into there where it narrowed, was there lots of foliage and trees and bushes?

A. Yes, sir, there were.

Q. How wide was it when it narrowed down, would you say? [207]

A. Well, I think the narrowest parts the horses could go through it all right.

Q. One at a time? A. Yes.

Q. Were there any turns in the trail?

A. Yes, sir, there were. I would say maybe around three. There may have been more, but I am sure there were three.

Q. Going up that way did Mr. Dillon ever get out of your sight by say one of the bends at any time? Of course, I know you were second?

A. Yes, sir, he did because we varied on our distances.

Q. All right, we will get back to our trip coming back. You started off at a slow pace?

A. Yes.

Q. How long did that continue?

A. You mean slowly, sir?

Q. Yes, in the distance of feet or the portion of the way, would you say you went one-eighth of the way or one-fourth of the way going slow, or what?

A. During the little foliage maybe we went about half the way or three-fourths of the way in the little forest we went through.

(Testimony of Ann Hargrave.)

Q. Coming back could you observe on your left where the foliage was and trees and bushes and things, the greenery [208] were you observing on the right and left? A. Yes, sir.

Q. This is coming back. Could you see anything to your right or was it obstructed by something?

A. To the right was all trees.

Q. What about to the left?

A. Well, to the left every once in a while there would be a little clearing where the sun would come through, and a little place where you could see the lake and the mountains back there.

Q. Would it be wide enough a person could stop and get a view? A. Oh, yes.

Q. I see. So you were all coming along. Do you know whether or not your father, either going slow or stopping the horse or anything, took the last picture on the trip back? Do you know whether he did or not? A. No, I don't.

Q. But he remained in the back even going up and coming back all the way?

A. Yes, he did.

Q. All right now, Ann, confining your testimony to the time you all got—you said you went about three-fourths of the way at this particular point, were you riding in the proximity or nearness to Mr. Dillon? I mean were you not close to him?

A. I think there was about the distance [209] of a horse between us at that time.

Q. Did you look back to see how far back your father was? A. No, sir.

(Testimony of Ann Hargrave.)

Mr. Blewett: At what point is this that you asked her about how far?

Q. Ann, do I understand about three-fourths of the way you all had come to what I am going into with you next, is that right?

A. No, sir, you see it was just a little forest about half the way or maybe three-fourths of the way back from the distance, from the hitching post to the lake itself. I stated we had come around three-fourths of the way through the foliage.

Q. Through the foliage?

A. Yes, sir—not back to the stables.

Q. But now did you look back—as you came to up Mr. Dillon did you look back to see if you could see your father? A. No, sir.

Q. Had you looked back on occasions to see if you could see him, and had your view been obstructed on the turns?

Mr. Blewett: Your Honor, again it is leading.

The Court: Objection sustained. I think you should divide that question, Mr. Kouri.

Q. Ann, state whether or not you ever looked back looking for your father on the way back from the lake? [210] A. Yes, sir.

Q. State whether or not you ever, at the turn area, ever looked back? Did you occasionally look back?

A. Yes, I believe I did once. And I waited for him until he got up with me.

Q. In other words, did you see him?

A. No, I didn't.

(Testimony of Ann Hargrave.)

Q. All right, thank you. All right, did you then come up, ride up then coming toward the latter part of the trip back, come up and say anything to Mr. Dillon?

A. Yes, sir, we were going very slowly.

Q. Where were you at this point, if you recall?

A. Well, we were almost——

Q. Were you on a straight away? Were you on a straight away part of the trail, or do you remember?

A. I don't remember if we were, but we were almost out of the forest. We weren't quite out of it yet.

Q. How did you ride up toward Mr. Dillon's mount? A. I did not ride up, sir.

Q. Where were you in reference to his horse?

A. About the distance of maybe a horse or two horses between us.

Q. I think you told me a while ago. I had forgotten. What did you say?

A. I asked him if we could go just a little faster. [211]

Q. State whether or not you had observed his attire with reference to his shoes or boots, what he had on?

A. Well, he had on boots. He had on spurs.

Q. That is fine, thank you. When you said that, what did he say, if anything?

A. Sir, he did not say anything.

Q. What did he do?

(Testimony of Ann Hargrave.)

A. Well, we waited for just a short pause and then the horses just charged off.

Q. Whose horse charged off first?

A. Mr. Dillon's.

Q. Then what did your horse do?

A. Charged off, went into a full gallop.

Q. Did you spur your horse? You did not have spurs on did you? A. No, sir.

Q. Did you kick your horse?

A. No, sir, I did not do anything to him.

Q. So as you described it when he started his, then yours started?

A. Yes, it just charged off.

Q. All right, what kind of run was it, if you know? A. Well, it was a full gallop.

Q. A full gallop? A. Yes. [212]

Q. All right, describe it from there on. What happened then?

A. Well, we were going so fast that my vision was blurred. I couldn't see anything in front of me and it frightened me. I yelled to stop. I heard my father yell at that time. He was yelling whoa. It frightened me. I called to Mr. Dillon to stop again. In a few minutes, I imagine I had run about a block, he stopped his horse and mine stopped also, and I turned my horse around and I saw my father's horse just galloping full gallop toward us.

Q. How was your father moving as you were there, as he was galloping toward you?

A. When he stopped he was leaning off the side.

(Testimony of Ann Hargrave.)

Q. Before he stopped how was he going, coming toward you?

A. I couldn't see him. It was going too fast.

Q. Then his horse came up and stopped?

A. Yes.

Q. Go ahead?

A. After his horse stopped I could tell, he was leaning off the side of his saddle, over the right side of his saddle.

Q. Who?

A. My father was leaning over the side of his saddle; and Mr. Dillon and I turned around and went over to him. You could tell he was in pain. He had his hand on his back. [213] He was in pain. You could tell by the expression on his face. He was hurting very badly.

Q. How much was the saddle off?

Mr. Blewett: That is a leading question again, unless I missed something.

The Court: What was the question?

Mr. Kouri: I said how much was the saddle off?

The Court: She testified to that. Overruled. You may answer the question.

Q. Ann, a while ago did you say something about the saddle?

A. Yes, sir, I did. I said that the saddle was leaning over to the right side.

Q. Now my question, about how much approximately?

A. Well, the horse would be about like that (in-

(Testimony of Ann Hargrave.)

dicating with hands). He was leaning over a good distance.

Q. I see. Did Mr. Dillon do anything?

A. Yes, he stopped. We both stopped our horses. He had to push the saddle over and straighten it.

Q. Did he do anything with reference to the cinch at that time, if you remember?

A. It seems as though he had to tighten it, but I am not for sure.

Q. All right, thank you. All right, Ann, go ahead and relate the relevant matters you heard between your father and [214] Mr. Dillon, as to what you heard and what you all did going on back?

A. Well, I don't remember the exact words, but Mr. Dillon after he saw my father, he seemed rather disgusted about it, that he was leaning over the horse and that his back was hurt. He was just rather perturbed about the idea, and then after we——

Mr. Blewett: Wait just a minute, Ann, if you will please. I believe I would rather have the counsel ask her a question from time to time so that I will know what is coming.

Mr. Kouri: I thought it would save the objections on leading.

Q. All right, Ann, then I believe you said you observed your father? A. Yes.

Q. I believe you described that. Was anything said about your father getting off the horse, what your father said?

A. Well, I do not know, I think he was rather

(Testimony of Ann Hargrave.)

doubtful about riding the horse back and he wanted to get off, but he couldn't do anything. He couldn't move. He was just in pain.

Q. Did he get off?

A. No, sir, he couldn't.

Q. How long would you say you stayed in that area that time? [215]

A. I imagine we stayed around ten minutes, by the time Mr. Dillon adjusted the saddle.

Q. Ann, how far was it from that point back to the hitching post, your best estimate? I know it has been a long time?

A. I imagine we had come I would say three-fifths of the way back.

Q. About three-fifths of the way back?

A. Yes.

Q. Then what did you all do when you were all ready? Did you ever get off your horse?

A. Yes, sir, I think I did.

Q. I see. All right, did you mount then, you and Blacky, Mr. Dillon? A. Yes, we did.

Q. Then did you all come back in to the hitching post?

A. Yes, slowly we came back to the hitching post.

Q. Was anything said then by Mr. Dillon on the way back, did he say anything else?

A. I don't recall.

Q. Did you all then get to the hitching post?

A. Yes, we did.

(Testimony of Ann Hargrave.)

Q. And do you remember who got off first or not?

A. Well, I do not know if it was Blacky or myself, because I could get off my horse easily. [216]

Q. And who paid for the trip?

A. My father did.

Q. Do you know how much?

A. I think it was four dollars, or around four dollars.

Q. I see. Do you recall then approximately about what time it was then, Ann?

A. Well, I will say maybe one or one-thirty.

Q. I see. Ann, when the gallop started there, after you related that Mr. Dillon started off at a gallop there, then were you in a position to see Mr. Dillon?

A. You mean while we were galloping?

Q. No, just before you started into the gallop did you see him? A. Yes, I saw him.

Q. After you had made that request did you see whether he looked back any to take a look back toward where your father was?

A. No, sir, he didn't.

Q. Did he make any utterance about we are going to go into a gallop?

A. No, sir, he did not say anything.

Q. Did he say anything to you we are going into this gallop? A. No, Mr. Kouri.

Q. You started out then. With reference to the horses, [217] both yours and Mr. Dillon's, was

(Testimony of Ann Hargrave.)

there any noise made when you were going on this gallop?

A. Yes, the hoofs beating against this ground.

Q. Were they light or medium, or did they make quite a sound?

A. They were heavy, very heavy.

Q. And did that continue, that noise of the horses' hoofs on the turf or the ground there, did that continue on for that whole block?

A. Yes, sir, it did. We were really going.

Q. All right, then, after you all left the place there, where did you and your father go?

A. We went back to the car.

Q. Was your mother there?

A. Yes, she was.

Q. You all started back for Texas?

A. No, we went to a motel.

Q. Oh, yes. What happened there?

A. Well, I believe that we were supposed to go with the Ryans to a lecture that evening. We had planned—we had made arrangements before when we saw them, and we were going to go, but daddy's back, he was in pain and he went to bed immediately when we went to the motel and stayed there.

Q. When your first saw your mother, did your father make any remark to your mother without her asking him? About anything having happened with regard to his back? Do you understand? [218]

A. Yes, sir.

Q. Did your father say anything voluntarily to

(Testimony of Ann Hargrave.)

your mother when he first saw her there at the car about what had happened? A. Yes, he did.

Q. In substance what did he say?

A. Well, I do not know if he said we are going to have to get a motel, or I am going to have to lie down, or something because my back is hurting.

Q. Did he say how he hurt it?

A. I don't recall, sir.

Q. All right, Ann. Now how long did you all stay at the motel?

A. We stayed that evening, that afternoon and that evening, and the next day, and I don't recall if we stayed longer or not.

Q. Did your father make the lecture that night, or did he stay in bed?

A. No, sir, he couldn't. He was unable to go.

Q. What about the next day? Was he able to get up all right?

A. Well, very little I think.

Q. And then later on you all started on back to Texas? A. Yes.

Q. How old were you then? [219]

A. Let's see. I must have been thirteen or fourteen, I don't recall.

Q. Did your mother do anything for your father on the way back to Texas?

A. Yes, sir, she had to put a pillow in back of his back and put her arm there and brace it up a little bit and try to make him as comfortable as he could be on the seat.

(Testimony of Ann Hargrave.)

Q. Did he on the way back stop at some place to get something?

A. Yes, I believe it was in Colorado he stopped and he got a little piece of board to put in back of his back when he was driving.

Q. And then how long did it take you all to come back, approximately?

A. Oh, we had a hard time. It must have taken a week I think to come back.

Q. Ann, you have made trips with your parents before this trip, haven't you? A. Yes.

Q. Extended trips? A. Yes.

Q. Tell the jury whether or not you had ever seen your mother administer aid and attempt to comfort your dad like she did on this trip going back to Texas?

Mr. Blewett: Wait a minute. Your Honor, [220] I think that is an improper question. It is incompetent, irrelevant and immaterial. It doesn't show that the circumstances were similar or the same or what treatment or comfort she might have rendered or what he means by treatment or comfort.

The Court: Objection sustained.

Q. Ann, basing it on your observation, and comparing it on this trip going back to Texas and other trips, just based on your observation, did you ever see your mother put a pillow behind your father's back; that is, like she did on this trip, and the sweater and a board? A. No, sir.

Q. When you all got home, what happened then?

A. Well, I think when we got home, well, daddy

(Testimony of Ann Hargrave.)

couldn't sleep at night or anything, and he had to get a board and put it down on the floor and sleep on the floor. He was uncomfortable in bed.

Q. You observed him all that time?

A. Yes.

Q. Was he able to go down to the office for the first two weeks or more?

A. No, sir, I think he stayed at home most of the time.

Q. Now, Ann, confining your testimony before June 23, 1956, did you have an opportunity to observe your father day and night outside of the time he was at the office? Observe his walk? [221]

A. Before the accident?

Q. Before the injury? A. Yes, I did.

Q. Describe to the jury in a very brief way what you observed from the way he walked and got around and such before June 23, 1956?

A. Well, he would move around easier, and he was always moving around.

Q. Did you ever hear him complain any about how he has been complaining since this injury?

A. Oh, never. No, never.

Q. In comparison to that observation, now your observation after you all got home, compare the way you have observed him? Compare the way he appeared and walked and everything after June 23rd to the time before June 23rd?

A. Well, he is slower. He slowed up and everything, and he usually goes to bed very early at night.

(Testimony of Ann Hargrave.)

Q. When would he go to bed before the injury approximately, on the average?

A. Maybe ten or ten thirty or eleven, I don't recall.

Q. Did your mother and father have guests and go out before the injury? A. Yes, sir.

Q. Have they any since that time?

A. Well, they haven't too much. Around that time of [222] the evening he gets tired and usually goes to bed early.

Q. What time does he go to bed now, approximately?

A. Very early, sometimes seven or seven-thirty or eight.

Q. Do you know whether or not he comes home earlier from the office now than he used to?

A. Yes, sir, it seems as though he does. He comes home around half an hour or maybe an hour earlier.

Q. What does he do when he comes home from the office that is different from what you have observed before the injury the 23rd of June, 1956?

A. Well, he is usually very tired, and he usually just sits down or maybe sometimes he will rest for a while.

Mr. Kouri: That is all. You may have the witness, Mr. Blewett.

Cross Examination

Q. (By Mr. Blewett): Ann, do you have a recollection now as to the point on this trail where

(Testimony of Ann Hargrave.)

your dad caught up with you and Blacky Dillon and the three of you stopped? Do you have any recollection as to the trail or any road or anything there, Ann?

A. Do you mean the distance from——

Q. No, I will put it this way, Ann. Can you describe to me generally what the condition of the area was there where you say your dad and Mr. Dillon and you were stopped, just before you went back to the hitching post? [223]

A. Well, it was rather level there, and it was clear. We had come out of it then. It was clear there.

Q. Do you have any recollection as to whether or not the trail at that point branched off the road, the trail to the hitching post branched away from the road which theretofore had formed part of the trail? Do you understand my question, Ann?

A. Well, I don't recall. You mean if there was a road branching off from the trail that we had come up on?

Q. Yes.

A. It seems as though there was a road around there, but I couldn't say.

Q. And the trail branched off to the right, did it, to go to the hitching post?

A. No, sir, I think it went to the left.

Q. The trail? A. Yes.

Q. This trail that you defined, would you say whether or not it was wide enough for a horse and wagon in most places?

(Testimony of Ann Hargrave.)

A. Not in most places.

Q. Well, the trail from the hitching post up to Lake Josephine, the one I have in mind, your recollection is it would not be wide enough for a horse and wagon?

A. In the clear parts I am sure it would be, but after about half way it was narrow and trees had grown in. [224]

Q. Your testimony is that where the horses ran you were in the clear, weren't you?

A. It was rather clear around there. On the right side we always had trees. On the left side it broke out a little bit and it was clear on the left side and it was on the right. I believe we were still maybe in the forest, what I call the forest, when I had asked Mr. Dillon to go just a little faster.

Q. Then your testimony is he waited a few minutes and then ran? A. Yes.

Q. Do you recall, Ann, whether you were in the clear to your left when the horses started to run? Do you understand my question?

A. Yes, sir, I do. I am trying to think. It seems as though we were still in when we started running, when we started galloping, we were still in the thicket there when we started, and when we stopped we were out in the open.

Q. And it is your recollection that at the point where you stopped, the trail broke away from the road?

A. I couldn't say, sir. I am not certain of that.

(Testimony of Ann Hargrave.)

Q. Is that your best recollection of that at this time, Ann?

A. About the trail you mean, and the road?

Q. Yes?

A. I couldn't say. I don't recall. [225]

Q. Ann, I believe on your testimony you did testify that at certain points along this trail between the time you left and got to the lake and returned, there were points where there were curves and you couldn't see ahead, you couldn't see Mr. Dillon?

A. Yes, sir.

Q. And I think you said there were times you looked back and couldn't see your dad?

A. I believe. I did not look back very often, but one time I remember he was out of my sight.

Q. One time?

A. I couldn't say for certain.

Q. Well, this point where you stopped on the way back, could you at one point see the hotel or the riding stables?

A. No, sir.

Q. Directing your attention to a question I asked you in your home, Ann, on January 5th, do you remember my taking your deposition?

A. Yes, sir.

Q. I asked you a question, "Was your dad ever out of your view when you looked back?" and do you remember the answer you gave at that time?

A. No, sir.

Q. Your answer was, "I don't remember."

A. Well, sir, after this deposition was taken I remembered a few things I hadn't before. [226]

(Testimony of Ann Hargrave.)

Q. All right, Ann. Ann, what is your best estimate as to the distance your father was behind you when you first saw his horse running?

A. After we had stopped and I first saw his horse running?

Q. Well, whether you had stopped or not, when you first saw your dad's horse running, how far behind you was your dad then?

A. We had stopped then. It was about I would say the distance to the end of the court room, or maybe further.

Q. From where you are now to the end of the court room? A. Yes, sir.

Q. And you were stopped at that time?

A. Yes, sir.

Q. At the time I was at your home, Ann, I asked you a question as follows: "And what then, after you asked Blacky to make the horses go a little bit faster, did he do?" You answered: "Well, he waited for a few minutes and then he just took off and started running." My next question was: "Did he look back, or anything?" Do you know what your answer was? A. Did he look back?

Q. What was your answer to that question, do you know? A. No, sir.

Q. Your answer in that deposition was, "I don't remember." Now your testimony is that he didn't look back, isn't it? [227]

A. Yes, it is, but may I explain that, sir?

Q. You sure can.

A. You know I told you before I was a little

(Testimony of Ann Hargrave.)

nervous that first time you asked me all those questions, and when you finished I remembered a few things more than I had before you asked me those, before you had asked me those.

Q. Ann, are you nervous today?

A. Yes, sir.

Q. You are a little nervous now?

A. Yes, sir.

Q. Did you know I was coming all the way down to Texas to come to take your deposition? Didn't you know you were going to give me your deposition? Didn't your daddy's attorney tell you that?

A. I don't recall, sir.

Q. You were present and available for that purpose, weren't you, Ann?

A. Yes, but it was only natural for me to be a little nervous I think.

Q. Ann, did you by any chance see your dad taking any of the pictures on this trail on the way back?

A. Yes, sir.

Q. Do you know, were you able to see him take the last picture that he took?

A. I did not see him taking it, if that is what you are asking. [228]

Q. You did not see him? A. No.

Q. When did you first know that he had taken the last picture that he had taken on that particular trip?

A. Well, I imagine after he had gotten them developed and we saw them.

Mr. Blewett: I believe that is all.

Mr. Kouri: I believe that is all, Ann. Thank you.

A. You are welcome.

(Witness excused.)

Mr. Kouri: Your Honor, our next witness will be the lengthy deposition of Dr. Van Deventer. Could we recess at this time, or would the Court care to go on?

The Court: We will recess now. We will recess until 1:30. Court will be in recess until 1:30. (Jury admonished.) Court is now in recess. (11:40 a.m.)

(Whereupon at 1:30 p.m. court was resumed, at which time plaintiff, defendant, all counsel and all members of the jury were present.)

Mr. Kouri: Your Honor, at this time we would like to offer briefly the life expectancy of the plaintiff. Would you care to see this, as to what an actuary stipulated to?

Mr. Blewett: I have no objection to the competency of the table as to the American Standard, and they say it is your Honor. We will enter an objection to the introduction at this time because there is no evidence that warrants its introduction.

The Court: I will receive it subject to motion to strike if it is not connected up.

Mr. Kouri: Very well then we will reserve it if we may.

The Court: Either that or I will receive it subject to motion to strike. You may have it marked.

(At this time Plaintiff's Exhibit #20, being an American Table of Mortality, was marked and received into evidence.)

Mr. Kouri: Your Honor, at this time we would like to offer the deposition of Dr. Loyd R. Van Deventer, of Wichita Falls, Texas. Mr. Bretz will answer the questions. Ladies and gentlemen, this deposition we are offering of Dr. Loyd Van Deventer was taken at Wichita Falls, the 5th of January, 1959, [230] before a Notary Public and official court reporter, and I will ask the questions and Mr. Bretz will give the answers.

Mr. Blewett: Mr. Kouri, at this time, and in order to save some time, as we go through this it is understood in spite of what the notary public asserted in the front as to the stipulation, it is subject to all objections.

Mr. Kouri: Yes, your Honor, and if it is all right with both parties as we come to a question that might be objectionable I will not ask it if you like.

The Court: It occurs to me it might save time if it is done in that way. Then if there are any questions we can consider them in the absence of the jury.

Mr. Kouri: All right, sir. This is the deposition of Dr. Loyd R. Van Deventer in this case, direct examination by me.

DEPOSITION OF
DR. LOYD R. VAN DEVENTER

(Reading from deposition:)

“Q. Please state your name to the court and jury. A. Loyd R. Van Deventer.

Q. What is your profession?

A. I am a doctor.

Q. Medical doctor? A. Yes.

Q. Where do you live?

A. I live at 2006 Avondale, Wichita Falls.

Q. How long have you lived here, Dr. Van Deventer? [231]

A. I have lived in the city seven years.

Q. How long have you practiced medicine in Wichita Falls, medicine and surgery?

A. I practiced two years in the Air Force and five years in the city, private practice.

Q. Do you maintain your own clinic in this city?

A. Yes, sir.

Q. What medical school are you a graduate of?

A. I graduated at the University of Oklahoma.

Q. Did you receive a medical degree from that university? A. I did.

Q. In what year, Doctor? A. 1947.

Q. Thereafter, did you go into a period of internship? A. Yes.

Q. Where?

A. At the Henry Ford Hospital, Detroit, Michigan.

Q. For how long, Doctor?

(Deposition of Dr. Loyd R. Van Deventer.)

A. For one year and after that I was a resident in orthopedic surgery at the University of Oklahoma Hospital from 1948 to 1951.

Q. And after that time?

A. After that I was Assistant Chief of Orthopedic Surgery at Sheppard Air Force Base from 1951 to 1953.

Q. Then did you open your own clinic? [232]

A. Then I opened my practice in Wichita Falls.

Q. Are you a duly licensed physician and surgeon? A. I am.

Q. Having been licensed by the Medical Board of the State of Texas? A. Yes.

Q. Is your license duly recorded in Wichita County, Texas at the Clerk's office? A. It is.

Q. What honorary societies are you a member of?

A. I am a member of the American Board of Orthopedic Surgeons, and the American Academy of Orthopedic Surgeons.

Q. Are you a member of the Wichita County Medical Society? A. Yes.

Q. And the State Society?

A. Yes and also the American Medical Association.

Q. Do you specialize in any particular field of medicine? A. Orthopedic surgery.

Q. Tell us briefly what the term, orthopedic surgery entails?

A. Orthopedic surgery is that specialty which deals with diseases or conditions affecting the loco-

(Deposition of Dr. Loyd R. Van Deventer.)

motor apparatus of the body, the apparatus which moves parts of the body.

Q. In other words, it is the bones and joints, bone and joint surgery? [233]

A. Bones, joints and muscles.

Q. You have specialized in that particular field for how long, how many years?

A. Seven years in practice and three years in post-graduate work.

Q. Dr. Van Deventer, do you know the plaintiff, Dr. Robert L. Hargrave? A. Yes.

Q. How long have you know him?

A. I've known Dr. Hargrave five years.

Q. He is a practicing physician and surgeon in this city? A. Yes, sir.

Q. Did you have occasion to examine Dr. Hargrave any time the past few weeks or months?

A. I have.

Q. Did he make an appointment to come by and see you? A. Yes, sir.

Q. Did you have any business dealings with him before? A. Yes, sir.

Q. In connection with the practice of medicine and surgery? A. Yes.

Q. Anything other than that?

A. No, sir. [234]

Q. On few or many occasions?

A. You mean, practicing together?

Q. Consultations together.

A. I would say on a few occasions.

(Deposition of Dr. Loyd R. Van Deventer.)

Q. You have your records and notes there in front of you, in your file? A. I do.

Q. What date did you first examine Dr. Hargrave? A. September 8, 1958.

Q. Here in your clinic? A. Yes, sir.

Q. Did he have some X-rays with him?

A. He did.

Q. How many, if you recall?

A. I don't recall the number, a rather large number which extended from July 1956 to about the middle of 1958.

Q. Do you have all of those X-rays here on your desk? A. I do, yes, sir.

Q. Do the X-rays show markings or reveal who took the X-rays? A. Yes, sir.

Q. What doctor did you learn from the markings took the X-rays?

A. The first films were made at the Bethania Hospital.

Q. Here in this city? [235]

A. In this city. And the next series of films were made at New Orelans. The second films were made in New Orleans by Dr. Ane.

Q. Were any made by Dr. Wickstrom of New Orleans?

A. I know that Dr. Wickstrom saw him. I didn't see any films that would identify specifically that they were made by him.

Q. Did you take any X-rays of the plaintiff, Dr. Hargrave? A. I did.

Q. And do you have them in your possession?

(Deposition of Dr. Loyd R. Van Deventer.)

A. Yes, sir.

Q. Were they taken under your direction and supervision? A. They were.

Q. How many did you take?

A. I believe there were three.

Q. What did they consist of?

A. They consisted of film of the dorsal spine, two films of the dorsal spine and two films of the lumbar spine.

Q. Would you please get those films and let the reporter mark them, please?

A. This is one of the first films, made by Bethania.

Mr. Kouri: We offer them in evidence as Plaintiff's Exhibits Nos. 1, 2, 3 and 4."

Mr. Blewett: Just for the record here, again I think those exhibits, the X-rays identified as 1, 2, 3 and 4 should carry a consecutive number here.

The Court: Could we identify them now? [236]

Mr. Kouri: Yes, that should be done, your Honor.

The Court: Let the record show that in the testimony of Dr. Van Deventer in his deposition that Plaintiff's Exhibit #1 is now Plaintiff's Exhibit #21; Plaintiff's Exhibit #2 is now Plaintiff's Exhibit #22; Plaintiff's Exhibit #3 now #23 and #4 is now #24. That will identify them for the record.

(Whereupon Plaintiff's Exhibits #21, #22, #23, and #24 being X-rays were admitted into evidence.)

(Mr. Kouri resumes reading of deposition.)

(Deposition of Dr. Loyd R. Van Deventer.)

“Q. Now, Dr. Van Deventer, on how many occasions did you examine Dr. Hargrave?

A. On two occasions.

Q. When was the last time that you examined him? A. October 7, 1958.

Q. Did you see him this past week?

A. Yes, sir.

Q. Did you make an examination of some sort this past week?

A. No, sir, we just went over all of these X-rays.

Q. When was that, last Saturday?

A. Saturday, yes.

Q. Now, on your first examination, Dr. Van Deventer, and after making your X-rays, what were your findings? [237]

A. Well, first of all his films revealed a compression fracture of the vertebral body of T-10, the tenth dorsal vertebrae.

Q. What were your other findings in connection with your examination of Dr. Hargrave?

A. Well, actually, from a physical standpoint, he shows very little physical findings. The major finding is by virtue of these X-rays and by virtue of his history.

Q. Was that a compression fracture that you noticed?

A. Yes, it was a compression fracture.

Q. Of that dorsal number 10?

A. That's right.

Q. Did he relate to you a history of his injury?

A. Yes, sir.”

(Deposition of Dr. Loyd R. Van Deventer.)

Mr. Kouri: Your Honor, on line 8 I will let the Court pass on the merits of that objection.

(At this time there was discussion between court and counsel outside the hearing of the jury.)

Mr. Kouri: Page 12, line 1.

Mr. Blewett: Your Honor, the objection would carry through because it is related to the same thing. It is related to the history. It is hard for you to judge.

The Court: I don't have it here.

(Whereupon there was further discussion at the bench outside the hearing of the jury.)

Mr. Blewett: Go ahead, we will try to speed it up. [238]

The Court: You go ahead with that question.

(Mr. Kouri resumes reading of deposition.)

"Q. In other words, do you have an opinion as to whether or not this condition was caused by trauma? A. I believe it was.

Q. In your opinion?

A. In my opinion.

Q. And trauma means what?

A. Trauma means an injury.

Q. Of course, on your testimony that you have given us already and what you will give as I ask you these questions, you are not basing any opinion that you are going to give on the history, are you? In other words, it is going to be due to the findings that you have made?

A. That's right.

(Deposition of Dr. Loyd R. Van Deventer.)

Q. Now, did you examine X-rays that were made by Dr. Ane and the ones made by the Bethania Hospital? A. Yes, sir.

Q. And did you note anything unusual about the X-rays with reference to Dorsal Number 10, in those other X-rays that you examined?

A. Yes, first of all, the films made at Bethania Hospital were not as good quality, actually, as the ones that were made later in New Orleans. However, all the films reveal compression [239] of the vertebral body of T-10 approximately one-third, as compared to the adjacent vertebrae.

Q. Please get the X-rays that show the pronounced fracture and put it on the shadow box, Doctor. I want that other one, that small one that had the red markings on it. We will get the other one later. Now this X-ray that was made by Dr. Ane on the right here, on the shadow box, please point out in that X-ray where you found any abnormality."

Mr. Blewett: I think, if Mr. Kouri doesn't mind, it is not going to make too much sense to refer to these X-rays. I am willing to say what Dr. Van Deventer is referring to is generally what was reflected in the testimony coming so far as his condition is concerned.

Mr. Kouri: We will waive presenting it to save time.

The Court: I don't think it will make much sense to the jury if they don't have the X-rays.

Mr. Blewett: The only thing, in making this

(Deposition of Dr. Loyd R. Van Deventer.)

waiver or concession at this time, I don't necessarily adopt the Doctor's findings. I am just waiving that we should refer to each X-ray each time he makes reference to it, and I will concede that the photographs in general show the condition that was observed in the view box this morning. Are these films in evidence we are talking about?

Mr. Kouri: They are, yes, sir. We might add three of them. We have just got 5, so 6 will be 26 and 7 will be 27. #5 will be #25. [240]

The Court: I see, you have three more.

Mr. Kouri: Yes, sir.

The Court: That will be 25, 26 and 27.

(Whereupon Plaintiff's Exhibits 25, 26 and 27, being X-rays, were received into evidence.)

(Deposition continued.)

"A. First, on the film on my left, P-25 Exhibit, is a lateral X-ray, an X-ray made from the side, of the lower dorsal spine, which reveals a compression of the front portion of the 10th dorsal vertebra, and interruption of the cortex of this vertebra, inferiorly, P-26, which is an oblique film, taken from a slight angle of the same area, reveals a definite interruption of the inferior cortex of T-10.

Q. Can you see from the Exhibit No. 26 the fracture line in the vertebra?

A. Yes. Here is the fracture line, here, by the interruption of this cortex. This cortex being perfectly smooth, we see here the offset.

Q. In what part of it, sir?

(Deposition of Dr. Loyd R. Van Deventer.)

A. The inferior. In the inferior. That would be down toward the feet, the bottom, so called, of T-10.

Q. Now will you put that other one that we had on the shadow box, P-27. You have placed Plaintiff's Exhibit No. 27 in the shadow box?

A. P-27 is a lateral or a side view of the dorsal spine [241] which was made at Bethania Hospital. This film, as we commented before, does not show the details and is not technically as good a film as P-25 or P-26, however, it does reveal the compression of the vertebral body of T-10 compared to the adjacent vertebra. These measurements have been recorded by the radiologist and they are written clearly on the film, 26, 26, 28, 30 and T-10, 22."

The Clerk: They say they don't have 6 and 7. So before we get any further we had better find out where 26 and 27 are.

The Court: 26 and 27, we had better get those identified. Which is it, Doctor, 6 in the deposition was which one this morning? What is that?

Mr. Kouri: 15 and 26 are the same then, Judge.

The Court: Let the record show that the reference in the deposition to Plaintiff's Exhibit 6 has been received in evidence as Plaintiff's 15. And what about 7?

Mr. Kouri: That is 16.

The Court: Let the record show that X-ray referred to in the deposition as #7 has been received in evidence as #16.

(Continuing to read:)

"Q. Twenty-two what?

A. Millimeters.

(Deposition of Dr. Loyd R. Van Deventer.)

Q. What is significant and what is your opinion [242] in regard to the width of T-10 amount to only around 22 millimeters?

A. Well, the vertebra has been squashed, so to speak or compressed, so we refer to its technically.

Mr. Qouri: Line 25.

Q. Dr. Vandeventer, what is your opinion in regard to that condition existing as you found it in this X-ray of the vertebral column, especially in regard to T-10?

A. It is my opinion that when the adjacent vertebrae in a spine are considerably larger by measurement than a single affected vertebra, then that vertebra has been compressed by injury at some time.

Q. With reference to any congenital conditions, would you please tell us whether you have an opinion on that?

A. It is my opinion that in a congenital condition several vertebrae, probably all of the dorsal vertebrae would be more or less equally compressed.

Mr. Kouri: Page 16, line 12.

Q. (I am reading the question and answer): Did he relate anything about any affect to the lower extremities?

A. He related to me a history of numbness to the outer side of his left foot. He alleged no pain in his leg but only numbness. He said that he thought for a while that it might have been due to an injury to his foot in the stirrup but he aban-

(Deposition of Dr. Loyd R. Van Deventer.)

done that idea in that the numbness has continued to this time. [243]

Q. Did you compare the film, films in X-ray, with the ones that were taken by Dr. Ane in New Orleans? A. Yes, sir.

Q. What were your findings from your own X-rays?

A. They revealed very little change, and, again, my films are not as clear as those obtained by Dr. Ane in New Orleans. They do reveal, however, the wedging or the compression of the 10th dorsal, which has been present on all the films.

Q. Do you have an opinion as to whether or not this was an old injury or one that could have occurred, say, in June of 1956?

A. It is my opinion that this is related to the injury of June, 1956.

Q. Doctor, you are familiar with the medical treatise and book by the orthopedic surgeons, Kay and Conwell, aren't you? A. Yes, sir.

Q. They are orthopedic specialists, are they not, and authors?

A. Dr. Kay is dead now. Dr. Conwell—I'm not certain about him. They were very good. I'm not certain—they both may be dead; I'm not certain about Dr. Conwell.

Q. Their works and books on orthopedics are considered excellent, are they not? [244]

A. They are good men.

Q. Doctor, when you have a compression fracture such as you described here, state whether or

(Deposition of Dr. Loyd R. Van Deventer.)

not it involved the disc area around the vertebra, in the injury such as you described?

A. I think almost——”

Mr. Blewett: Now I do object to this, your Honor, upon the ground and for the reason it does not confine it to this particular injury. It says when you have a compression fracture. Go ahead. Let's go on.

The Court: You may answer.

“A. I think almost invariably it does involve the disc.

Q. Now in your examination of Dr. Hargrave's X-rays, including the ones that you made, did you note any difference in the space area, below T-10, the space area?

A. Yes, the films have all revealed—I am referring now to Exhibit 7—they all reveal narrowing of the disc space between T-10 and T-11 so we would call that the tenth disc.

Q. Do you have an opinion as to whether or not that condition was caused by trauma, or not?

A. I would expect it to have been.

Mr. Kouri: Now the next page, line 8.

Q. I asked you about fragments. Does a compression fracture, such as this, ordinarily cause bits of the vertebra to dislodge—portions of it? [245]

A. Well, very rarely does it produce little bit fracture or small fractures of the bone. It does, occasionally. But I would say in fractures of the spine at least ninety per cent of them show no comminution, which would be little bits. In other

(Deposition of Dr. Loyd R. Van Deventer.)

words, ninety per cent of them are fractures of this type.

Q. Isn't it true that the cord becomes involved in compression fractures?

A. It does, occasionally, yes, sir.

Q. Would an X-ray tell whether Dr. Hargrave's cord is affected or not?

A. No, an X-ray wouldn't.

Q. How would you discern that?

A. You would discern that by examination.

Q. Would that be a perfunctory or casual examination or would it be a detailed, technical examination?

A. It would be a neurological examination, a technical examination related to his specific case would involve the bladder, the abdomen, the back, the buttock and both legs.

Q. It would require the services of a neurological surgeon?

A. Or an orthopedic surgeon.

Q. State whether or not in your opinion, in all reasonable medical certainty, whether you have found that this disc has been impaired or damaged to a degree. [246]

A. Which disc do you refer to?

Q. Between T-10 and T-11?

A. It is my opinion this disc has been damaged. I wouldn't attempt to put a name on it as to what damage has occurred, whether it is herniated or not, I wouldn't make that statement but the disc is involved by this injury.

(Deposition of Dr. Loyd R. Van Deventer.)

Q. You gave a report to Dr. Hargrave and to me, dated October 7th, did you not?

A. Yes, sir."

Mr. Kouri: Page 21, line 6.

"Q. So that numbness in the left foot is significant, is it not?

A. Yes, sir. With the question a while ago, I felt that you were interrogating me about the disc involvement at T-10.

Q. Dr. Van Deventer, do you have an opinion in regard to Dr. Hargrave's condition as to whether or not it is temporary or permanent?

A. It is permanent.

Q. Is that your opinion in all reasonable medical certainty? A. Yes.

Q. Based upon your examination of him and your X-rays and your entire examination of Dr. Hargrave? A. Yes, sir. [247]

Q. Do you have—Answer this, please, yes or no. Do you have an opinion, in all reasonable medical certainty, from your examination and findings, as to the extent and percentage of the permanent disability of Dr. Hargrave? Answer that, please, yes or no. A. Yes.

Q. In your opinion, what is the percentage of his permanent disability?

A. In my opinion he has twenty per cent permanent disability to the body now.

Q. In regard to his question, what are you basing that upon?

A. On the injury to the area at T-10, the disc,

(Deposition of Dr. Loyd R. Van Deventer.)

the tenth disc, as well as the tenth vertebral body fracture.

Q. Doctor, let me ask you this: Did you observe anything in the spinal column from the X-rays of Dr. Hargrave relative to any arthritic condition? Just answer that 'Yes', if you did.

A. Yes.

Q. All right, please tell us what you found in regard to that.

A. Well, he shows arthritis in the dorsal spine, which is more marked at T-9 and T-10, disc spaces, than at other areas. There is some degenerative arthritis at other portions of the lumbar spine and dorsal spine but not so marked as the first areas referred to. [248]

Q. What is your opinion in regard to the cause of it around T-9 and T-10?

A. I think that the arthritis is largely normal in his entire back. It was my opinion, and still is, that he shows some increase of the arthritis in the area adjacent to the fracture.

Q. What do you base that—upon your findings in the X-rays?

A. A comparison of the initial film with his most recent X-rays.

Q. That condition, in your opinion—What is your opinion of the future with reference to that arthritic condition?

A. Which condition?

Q. The arthritic condition in T-9 and T-10?

A. First of all, I think the cause of pain in in-

(Deposition of Dr. Loyd R. Van Deventer.)

jury, such as this, is due to the injury and not due to arthritis. The arthritis is a sequel of the injury that occurred and the arthritis begins to build, which occurs at any joint and the back is no exception, but I think the primary cause of his pain is the injury and he will build more spurring and more arthritis than in the other parts of the spine. I would expect that to be true.

Q. In your opinion, will that cause a lot of pain?

A. I don't believe the spurs themselves are the cause of pain. [249]

Q. I'm going to ask you a question about that. Will it cause pain?

A. It does, yes. It does in some people.

Q. Isn't that true because the muscles there—in the layman's language, the spurs are digging into the muscle?

A. Well, we don't know. Probably only 20 per cent of people have pain from spurs in the backbone.

Q. Is it your opinion in regard to the arthritic condition of T-8 and T-10 that it will remain quiescent, dormant, or that it will grow?

A. It will grow.

Q. Could that develop into a serious situation?

A. I doubt very much that it will. I think in all probability his pain may increase but not to the extent that it would be what I would term serious.

Q. Could the situation in regard to T-10 and

(Deposition of Dr. Loyd R. Van Deventer.)
the narrowing of these spaces between T-10 and T-11 be alleviated to a degree by surgery?"

Mr. Blewett: Don't answer that, Mr. Bretz. I want to object to that at this time for the reason there is no evidence in this case surgery has been recommended or that the Doctor will undergo surgery, and there has been no allegation he will have to undergo surgery or any disability will be involved in connection with it.

Mr. Kouri: We will withdraw the question. [250]

Mr. Kouri: Line 18, page 25. This is my last question.

(Reading:)

"Q. In view of what you have related to us, including the compression fracture and the narrowing of space between T-10 and T-11, and the arthritic condition you found, do you have an opinion as to whether this condition will worsen?

A. I thought we answered that. I believe that it will get worse.

Mr. Kouri: That is all."

Mr. Blewett: Mr. Bretz, can Mr. McCabe borrow your copy while we go through the cross examination?

Mr. Bretz: Yes.

Cross Examination

Mr. Blewett: Ladies and gentlemen, in this type of evidentiary proceeding the right of cross examination is granted to us and what I am about to read and Mr. McCabe is about to answer are the

(Deposition of Dr. Loyd R. Van Deventer.)

questions propounded by me and the answers given by the Doctor after Mr. Kouri had finished his examination.

(Mr. Blewett read the questions and Mr. McCabe the answers.)

"To get the history straight here, Doctor, you graduated from the University of Oklahoma Medical School in 1947? [251] A. Yes, sir.

Q. And interned for one year? A. Yes, sir.

Q. And then you had a three-year residency in orthopedics? A. Yes.

Q. And two years of orthopedics at Sheppard Air Force Base? A. Yes, sir.

Q. What type of work did you do there?

A. Traumatic injuries, almost entirely, hardly any spine work out there.

Q. Did you do any operations?

A. Oh, yes, a large number of operations.

Q. You have been in private practice here since 1953 and all in Wichita Falls?

A. Yes, sir.

A. And is that in connection with your present associate, Dr. Pace?

A. Dr. Pace and I were partners for about a year and a half. Now, we are just officing together.

Q. You said you were a member of the Board of Orthopedic Surgeons and a member of something else——

A. Well, this is the academic organization of the American Board and this is honorary, the American Academy.

(Deposition of Dr. Loyd R. Van Deventer.)

Q. I think you said the first time you ever [252] examined Dr. Hargrave was September the 8th.

A. Yes.

Q. Prior to that time, you had no knowledge of his injury?

A. He reported to me at sometime in the past that he had sustained a fracture of the spine; I don't recall the date, and I didn't make a formal examination.

Q. You have never treated him or examined him any time prior to September 8, 1958?

A. No.

Q. Now at the time you examined him on September 8, 1958, did I understand you to say that you had in front of you, or available for examination the X-rays that were taken in New Orleans?

A. Yes.

Q. As well as the X-rays you had taken?

A. Yes, sir.

Q. Did you have any other X-rays, other than the ones you have mentioned in your direct examination?

A. Yes, this whole volume of X-rays. Dr. Hargrave brought them with him.

Q. In other words, did you look at X-rays other than those you have specifically identified in your direct testimony? A. Yes, many others.

Q. Where were they taken? [253]

A. I don't remember all the places but there are so many films here—we could look at them.

Q. Did any of them pre-date 1956?

(Deposition of Dr. Loyd R. Van Deventer.)

A. No, sir.

Q. Do you know that of your own knowledge?

A. By going through them, yes, sir.

Q. You know that of your own knowledge?

A. By going through them, myself, yes, sir.

Q. The X-rays that were taken by or under the supervision of Dr. Wickstrom—I believe you identified Dr. Ane——

A. I'm not certain that he and Dr. Wickstrom are together but at any rate the films that we did identify were made by Dr. Ane.

Q. And I understood you to say that your examination of those X-rays with the X-rays that you took, reveal that the situation is about the same in his back? A. That's right.

Q. Was there any change at all that you noted in the X-rays taken by Dr. Ane and the X-rays taken by you?

A. Well, I feel there is a little increase in the arthritis but other than that, there is no change at all.

Q. And how about the X-rays that were identified as those at Bethania? Were there any change in the condition as reflected in the X-rays taken at Bethania Hospital and the X-rays taken by you?

A. Some small difference.

Q. And what would that difference be?

A. Some increase in the arthritis.

Q. And that is the only change?

A. Yes, sir.

Q. How long have you known Dr. Hargrave?

(Deposition of Dr. Loyd R. Van Deventer.)

A. Five years, about ever since I've been here.

Q. And where did you first meet him?

A. I don't recall, probably one of the staff meetings at the hospital when he and I were there.

Q. Was he in active practice when you came here? A. Yes, I think he was.

Q. Do you know whether or not he has been in active practice since you have been here?

A. As far as I know he has. I haven't had a lot of referrals from Dr. Hargrave. As I testified before, he referred me several cases, but as far as I know, he has been in active practice.

Q. You have had referral work from Dr. Hargrave?

A. Probably—I would say not over three cases.

Q. Those were all orthopedic cases?

A. Yes.

Q. Do you know Dr. Hargrave's specialty, if any?

A. General surgery and general practice, I believe.

Q. Going ahead to the estimate of disability that you [255] gave as being 20 per cent, how do you compute the 20 per cent, taking into account the doctor's vocation and profession as a surgeon?

A. Well, I think that is an equitable per cent, percentage of disability irrespective of occupation, with a compression fracture.

Q. Do I understand, then, Doctor that if this were a coal miner or manual laborer, that your estimate of disability would be the same?

(Deposition of Dr. Loyd R. Van Deventer.)

A. No, perhaps not but many times the pain that is provoked with this type of injury will be worsened by a prolonged condition rather than extreme condition.

Q. Your disability, then, is based on the pain rather than the inability to work? A. Yes.

Q. Well, undoubtedly you know from your medical training that compression fractures are quite common in coal miners.

A. I haven't treated any coal miners; I really couldn't say. They are quite common in the military service.

Q. And those people, with proper treatment, get back to work, normally, even at hard labor?

A. Yes.

Q. So a compression fracture, itself, is not particularly a disabling injury, is it?

A. No. [256]

Q. Have you ever treated Dr. Hargrave at all?

A. No, sir.

Q. All you have done is examine him for the purpose of making a rating of disability?

A. Well, the second time I examined him I was aware of the circumstances of the case. The first time I examined him I was not aware of those and I examined him just as a doctor, and as far as I knew, there was no litigation involved.

Q. On the occasion of your second and third examination, you knew that there was litigation involved? A. Yes, sir.

Q. Now, directing your attention back to June

(Deposition of Dr. Loyd R. Van Deventer.)
of 1956 (that part is out). Do you know what treatment the Doctor received in connection with the initial stage of this injury—do you know of your own knowledge? A. No, sir, I don't.

Q. Had you seen the Doctor, upon his return from the north and following this history of an accident which he gave you in 1958, what type of treatment would you have prescribed for the Doctor for the condition disclosed by the X-rays of 1956—I mean the hospital X-rays?

A. I would have prescribed bed rest.

Q. Would you have put him in a cast or an extension brace of any type?

A. No, sir. [257]

Q. Are you at this time, Doctor, able to identify a film that was taken by Dr. Ane which shows the disc spaces or is that information reflected in the pictures marked 25 and 26 which you had on the shadow box heretofore?

A. Yes, sir, that information is disclosed on 25 and 26."

Mr. Blewett: The rest of that has to do with 26, which he has already testified to, and unless counsel objects I will skip that.

Mr. Kouri: Yes, it will save time.

"Q. Now will you tell me in what way now you say the disc spaces are effected as far as 10 and 11 in the thoracic area involved here?

A. Only in as far as there is a narrowing between the vertebrae T-10 and T-11, largely pos-

(Deposition of Dr. Loyd R. Van Deventer.)

teriorly. As you can see here, as compared to this and this."

Mr. Blewett: Your Honor, the rest of this isn't going to make much sense. If I can get approval of counsel I am going to skip right through. It has to do with just about what he has testified to, where he points to the disc.

Mr. Kouri: That is all right. We will agree if it is overlapping you can just stop whenever you want to.

Mr. Blewett: Page 33, line 25.

"Q. I believe you testified that the presence of spurs or arthritis, the growth there is about what you consider average, is that right? [258]

A. Referring to the spine in general, yes, sir, I think so.

Q. (Page 34, line 25) In the history given to you by Dr. Hargrave, did he mention that he had arthritis prior to June of 1956?

A. He mentioned to me that he had had occasional trouble with his low back.

Q. Did he tell you what he thought the trouble was? A. No, sir.

Q. He didn't even mention that he had had arthritis in his back? A. No, sir.

Q. Do you recall the history that Dr. Hargrave gave you in connection with this accident, going into detail of this alleged accident and going into detail of its happening?

A. Well, only insofar as what I have given, and that is, that he was riding horseback and the horse

(Deposition of Dr. Loyd R. Van Deventer.)

caught him off balance and he noticed these two pops.

Q. And did he describe to you at that time where the pops were?

A. Well, he felt as though one of them was down low and one was up higher.

Q. Did he or did he not tell you that the horse started to run and bolted ahead?

A. I got that history later, the next time he came back. [259]

Q. Based on that history, you feel this could have resulted in a compression fracture?

A. Yes, sir.

Q. In your experience as an orthopedic surgeon, what do you consider the most normal cause of compression fractures?

A. The most normal?

Q. We might say the most usual cause?

A. The most usual cause is automobile accidents wherein the occupant is thrown out of the car and the spine is flexed or jack-knifed.

Q. Explain to me your theory here as to how the incident described by the doctor to you would result in this compression fracture.

A. This fracture is a result of a longitudinal force applied on the buttocks, or could have been applied on the head, with a jamming effect of head against buttocks, similar to the fractures we see in electric shock treatment.

Q. In your examination did you restrict it just

(Deposition of Dr. Loyd R. Van Deventer.)

to the history given by him and the X-rays you took? A. Rephrase that.

Q. What did you do in making your examination of Dr. Hargrave? Tell me in detail the extent of your examination, both subjective and objective.

A. First we got a history as to the injury and as to the complaints he was having at the time and what action [260] provoked pain and what relieved pain and such as that; mainly, what maneuvers relieved pain and what things provoked pain. Then he was examined as far as feats identifying posture and motion of his back and his lower extremities were examined insofar as weakness or numbness, reflex changes, atrophy, and any signs that would suggest nerve pressure, and we had the X-rays of his lumbar and dorsal spine.

Q. What do you have to say with reference to reflex changes?

A. I didn't find any reflex changes.

Q. What is your opinion with reference to whether or not that has a tendency to negative any neurological disorder?

A. I thought he was negative neurologically.

Q. Did you find any evidence in your examination of any previous injury to the spine or any other portion of the body? A. No, sir.

Q. The only evidence of pre-existing condition was the arthritis showing in the spine as a whole?

A. No, I would say the only evidence of pre-existing injury was compression of T-10.

(Deposition of Dr. Loyd R. Van Deventer.)

Q. There was also existence of arthritis in the spine as a whole? A. Yes.

Q. Can you, with reasonable medical certainty, identify [261] the time as to when the arthritis, the condition in general first had its onset?

A. In general, the onset is about forty.

Q. 1940?

A. No, at forty years of age, but speaking again in general terms, that usually doesn't show in X-ray until about fifty but symptoms of arthritis will begin many times ten years before the X-ray will show spurring.

Q. You can't tell from your examination of a man as to when the arthritic development first started? A. By X-ray?

Q. Or by history? A. No, neither one.

Q. Your opinion here expressed as to the present and time of existence of the — I'll withdraw the question. From your examination of this gentleman, you can't tell the extent of the arthritic development he had on T-10 and T-11 at the time of this alleged injury, is that correct?

A. I couldn't determine the extent?

Q. That's right.

A. Probably not. We usually classify these things as mild, moderate or severe. I could determine it to the extent of what severity it would be, considering his age.

Q. Yes, but I mean, trying to tie in the condition of arthritis which you have testified to here, can you or can [262] you not say that the arthritis

(Deposition of Dr. Loyd R. Van Deventer.)

showing around T-10 and T-11 date to June, 1956?

A. No.

Q. Tell me, Doctor, for my own information, what you describe as an interruption of the inferior cortex, are you referring there to the disc or to fracture?

A. No, that refers to fracture.

Q. The cortex refers to fracture?

A. Interruption of the cortex.

Q. And what do you mean by interruption of the cortex?

A. Well, you take a smooth line and put an offset in it, and that would be interrupted, or a loss of continuity of a given landmark.

Q. That is the degree of compression?

A. No, that is actually the fracture line.

Q. That is the fracture line. Can you show me on a picture what you mean by interruption of inferior cortex?

A. This is P-26, this cortex is interrupted, which is the inferior cortex of T-10.

Q. This is the compression area here, and if there were not interference, this would be down here a little ways, is that what you mean?

A. We don't necessarily have to see an interruption to make a diagnosis of a compression fracture but in this case there is a fracture line which is apparent here, which is [263] part of the compression injury. With compression this cortex is broken. The cortex of the bone did break. It is quite definite compared to this cortex.

Q. I believe you said on direct examination that

(Deposition of Dr. Loyd R. Van Deventer.)

you can't define the involvement of the disc at that point but you, none the less, think it is involved?

A. Yes, I do.

Q. And that is about as much as you can say about the disc?

A. That is all I could say about the disc.

Q. When you say that it is involved, do you make any tests as to the escape of the fluid or anything?

A. Well, no, I don't think it is indicated. He, neurologically, doesn't have any findings there.

Q. Well, then the involvement, in your opinion, isn't very serious as far as the disc is concerned?

A. No, sir.

Q. You would consider that minimum, would you—minimum involvement of the disc?

A. I believe so.

Mr. Blewett: That is all. Thank you for your time."

The Court: We will take a recess now. Court will be in recess now fifteen minutes. (Jury admonished.) Court is in recess. (2:30 p.m.) [264]

(Whereupon at 2:45 p.m., court was resumed, at which time plaintiff, defendant, all counsel and all members of the jury were present.)

The Court: You may proceed.

Mr. Kouri: By stipulation on medical reports, may we have a moment to offer these. We have agreed on these Doctors who did not appear, and the balance of the X-rays which were not offered.

The Court: #21 through #25?

Mr. Kouri: We offer those, your Honor.

The Court: The X-rays, Plaintiff's #21 through #25 are received.

(Whereupon Plaintiff's Exhibits #21, #22, #23, #24, and #25, being X-rays, were received into evidence.)

Mr. Bretz: We now offer by stipulation of counsel the medical report of Dr. Ane, of New Orleans, dated December 13, 1956, as Plaintiff's proposed Exhibit #26; and as Plaintiff's Exhibit #27, the report of Dr. J. D. Staid, department of radiology, Wichita Falls Clinic Hospital; and as Plaintiff's Exhibit #28, we offer a second report by Dr. J. D. Staid, department of radiology, Wichita Falls, Texas Clinic Hospital.

Mr. Blewett: On this next one, your Honor, Mr. Kouri, may it be understood that this is a true and correct copy of the original? The original has disappeared, your Honor, and I am stipulating that report can go in the record. I have [265] never seen the original.

Mr. Kouri: We will assure the Court it is a copy, your Honor.

Mr. Blewett: It is a true and correct copy?

Mr. Kouri: Yes.

Mr. Bretz: We offer as Plaintiff's Exhibit #29, a report from Dr. Jack Wickstrom, M. D. of New Orleans, dated October 16, 1956.

The Court: As I understand, Mr. Blewett, these four may be received in evidence without objection?

Mr. Blewett: Yes, your Honor.

The Court: Plaintiff's Exhibits #26 to #29 inclusive are received without objection.

(Whereupon Plaintiff's Exhibits #26, #27, #28 and #29, being medical reports, were received into evidence.)

Mr. Kouri: Call Mrs. Hargrave.

MRS. ROBERT HARGRAVE

having been duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Kouri): Please state your name to the Court and jury?

A. Mrs. Robert Hargrave.

Q. Mrs. Hargrave, are you the wife of Dr. Hargrave, the plaintiff in this case? [266]

A. Yes, sir, I am.

Q. And you all live at Wichita Falls?

A. Yes, we do.

Q. And have lived there how long?

A. Oh, I would say almost thirty years, or so.

Q. And little Ann, who preceded you on the stand, is your daughter? A. Yes.

Q. Do you recall planning a trip in June, 1956, the early part? A. Yes, I do.

Q. And did you discuss the matter with your husband and little Ann on many occasions?

A. Yes, we did.

Q. Did you discuss it with anyone else in your neighborhood?

A. Yes, we talked with Ryans.

(Testimony of Mrs. Robert Hargrave.)

Q. Do they live next door?

A. Yes, they do.

Q. Were they planning on going too?

A. Yes, but on another trip. It wasn't with us.

Q. Mrs. Hargrave, then after making your plans did you visit with the Ryans and discuss your various itineraries?

A. The Doctor did. I didn't.

Q. I see. Then approximately when did you all leave [267] Texas to come up here on your trip?

A. I think we left about June 1st.

Q. And just touching on the stops, where did you go to?

A. After we left home we went on through in New Mexico and Colorado and Salt Lake City, and then on into Montana, and then into Canada.

Q. And how much time did you spend in Canada?

A. Oh, I don't recall.

Q. A few days?

A. Yes, not too long.

Q. All right, and then coming back did you come through the State of Montana?

A. Yes, we did.

Q. Did you stop at any particular place on your way back home?

A. Yes, we did.

Q. What place was that please, ma'am?

A. Many Glaciers Hotel.

Q. I see. Now when you came into Many Glaciers had you planned to stay there a while, or overnight or what?

A. No, we did not. Doctor wanted to see the

(Testimony of Mrs. Robert Hargrave.)

Lake and Lake Josephine, a short distance I believe from the Hotel.

Q. Approximately what day did you come into Many Glaciers, if you recall? [268]

A. I believe it was June 23rd.

Q. Of 1956? A. Yes, sir.

Q. Do you recall the Doctor's license number on the car?

A. Oh, I think we had a very short number. It is either 44 or 37, I don't recall which one it was.

Q. Did you happen to run across any friends from home while you were at Many Glaciers?

A. Yes, we did, the Ryans.

Q. Please tell us briefly how that occurred, in your own words?

A. Well, let's see, Doctor and Ann were on this trip.

Q. First? A. Yes.

Q. Let's go into that first. Did you all drive in the car? A. Yes, we did.

Q. What kind of car? A. A Chrysler.

Q. And about what time of day was it when you arrived there?

A. It must have been around eleven o'clock or maybe ten thirty, or sometime right at that time.

Q. Then did you drive toward the Hotel? [269]

A. Yes, we did.

Q. Who was present?

A. You mean in the car?

Q. Yes? A. Ann, the Doctor and myself.

Q. Did you stop there at the Hotel?

(Testimony of Mrs. Robert Hargrave.)

A. Well, up there on the hill, not right at the Hotel.

Q. What was the purpose of stopping there?

A. As I stated, Doctor wanted to see Lake Josephine.

Q. And did Ann desire to go with him?

A. Yes, she did. I wasn't feeling well so I stayed at the Hotel.

Q. You told them then to go?

A. Yes, sir.

Q. And you did not make the trip?

A. No, I didn't.

Q. And about how long were they gone?

A. Well, I don't recall, because I took a nap. After I stayed in the Hotel a while I went back to our car and took a nap.

Q. I see. And then when they approached the car on their return from the trip, was anything stated to you from the Doctor in regard to anything?

A. Yes, the first thing he said——

Q. What was stated? [270]

A. That he hurt his back.

Q. And did he say how?

A. Yes, while he was on the horse.

Q. Was Ann with him? A. Yes, sir.

Q. How did he appear from your observation? Not from what he said, but how did he appear? Physically in other words, Mrs. Hargrave?

A. Well, he seemed highly nervous and in pain.

(Testimony of Mrs. Robert Hargrave.)

Q. I see. Then what happened? Where did you all go then?

A. Well, we found this note on the car at this time.

Q. That is when you found the note from the Ryans? A. Yes.

Q. And what did they say?

A. They asked us to visit them at their camp grounds, Swift Current Camp grounds.

Q. And did you all then go over to see them?

A. Yes. I don't recall whether we had lunch first or went over right then.

Q. I see. Did you find the Ryans there at their camp?

A. Yes, we found the Ryans and their camping party.

Q. And were both Mr. and Mrs. Ryan there, and their group?

A. Yes, and their daughter was with them. [271]

Q. Did you visit with them?

A. Yes, we did.

Q. All right, after that how long did you stay, would you estimate?

A. I really don't remember. I would imagine about thirty minutes or so.

Q. Was anything stated about the injury there at that camp while visiting with the Ryans?

A. Yes, Doctor told them there at that time.

Q. Then was there any discussion about attending a lecture that night?

A. Yes, Mrs. Ryan told us, or stated that she

(Testimony of Mrs. Robert Hargrave.)

would like to have us attend the lecture if we were going to stay.

Q. Did she say anything to you about recommending a motel to stay at?

A. Yes, she did. She said there was a new motel across the road, the main highway I believe, and said if we would stay that we should come down and go to the lecture with them that evening at Many Glaciers Hotel.

Q. Then after that did you and the Doctor and Ann go over to the motel and check in? I mean after you visited with them a while, or did anything else transpire before you went over there?

A. No, not anything.

Q. You went over to the motel? [272]

A. I think we debated for a few minutes, because we had planned on going on that day. But Doctor was having so much pain that we decided then we would stay there that night.

Q. Do you have an approximate time in mind about when it was you went over to the Motel?

A. It seems to me right now that it was around four something. I just am not too certain.

Q. When you checked in then what did the Doctor do, Doctor Hargrave?

A. Doctor Hargrave went to bed.

Q. Did you observe him after he got into bed?

A. Yes.

Q. How did he appear from his facial expression?

(Testimony of Mrs. Robert Hargrave.)

A. He was having pain and he was also chilling at that time. I know I couldn't get him warm.

Q. Did you have any medicine to give him, did he have any he took? A. No.

Q. Nothing at all? A. No.

Q. Then later did someone come over to your motel?

A. Well, we were supposed to meet the Ryans. I don't recall just what time the lecture was to begin, but Mrs. Ryan since we did not come, came over to our motel looking for us.

Q. And did she knock at the door? [273]

A. Yes, and I asked her to step in. I explained to her that the Doctor couldn't go with us, but Ann and I would go to the lecture.

Q. Did Mrs. Ryan say anything to Doctor Hargrave while he was there in bed, in parting? Did she say anything when she parted?

A. Not exactly. I don't really recall.

Q. She stayed briefly I presume?

A. Yes, oh, yes. She waited just a short time.

Q. So then after that, the next morning, do you recall observing Dr. Hargrave when he got up?

A. Yes, he seemed stiff all over, and still in pain. He still had pain at that time.

Q. Did he eventually get up and dress?

A. Yes, he did.

Q. And had you all then planned to leave, back on your trip back to Texas for that day, or had you decided to maybe put it off for a while?

A. No, we wanted to get on home because we had

(Testimony of Mrs. Robert Hargrave.)

been on this trip for sometime and we were anxious to get home.

Q. Now, Mrs. Hargrave, tell us in your own words and briefly what did you do on the way home insofar as the Doctor was concerned?

A. Well, the Doctor was in pain almost all the way home, and especially while he was driving.

Q. Did you put anything behind his back?

A. Yes, he asked me several times if I couldn't help him in some way. He suggested I roll a pillow and put it in this particular spot where it was painful, and also I had to — when it was so severe he asked me to push on his back.

Q. Did you do that?

A. Yes, many times.

Q. On a few or many occasions?

A. Many occasions.

Q. All the way back?

A. Yes, it was that way all the way back.

Q. About how many miles were you from home, about 1,800 wasn't it? A. Yes, about that.

Q. How many days did it take you to get back?

A. Oh, it took us I am sure it was around six days or so. We couldn't make very good time.

Q. How was his condition all the way back, from what you observed, his physical condition?

A. Well, I would say poor.

Q. Did he stop in Denver for any particular matter unusual? A. Yes, sir.

Q. What was that?

A. We stopped at a lumber yard to get a piece

(Testimony of Mrs. Robert Hargrave.)

of board [275] that Doctor felt like maybe if he would push against that in driving, it would give him some relief, and it did at times.

Q. He did use it all the way from Denver into Texas? A. Not all the time.

Q. But at times? A. At times, yes.

Q. From what you observed, would that seem to relieve him in sitting up there?

A. For a short period of time.

Q. I see. Now when you got home, I imagine it was around about—if you left about the 24th you got in about June 30th, something like that?

A. Yes.

Q. And how was Doctor Hargrave's condition for the first two weeks there at home?

A. That was even worse than our trip home.

Q. Tell us briefly and in your own words about what happened, what he did?

A. Well, he was in pain almost constantly. He did go down—he tried to go down to the office for a short period during the day, but he did not stay, and there were several days he did not go to the office at all. In fact, he did hardly any work during those two weeks. He was almost totally disabled.

Q. And after that time did you have an opportunity, Mrs. [276] Hargrave, to observe him at home and in the office? A. Yes.

Q. Incidentally, are you his medical secretary in the office, at times help him?

A. Yes, I do. I work at the office some.

(Testimony of Mrs. Robert Hargrave.)

Q. What percentage of the time would you say you help him out there?

A. Well, almost all the time. We do have a nurse that comes in, and also a stenographer.

Q. Have you had an opportunity to observe him there doing his practicing since you all come back, and since the two week period? A. Oh, yes.

Q. And is there very much difference in the way he gets around even in the treatment of his patients, as compared before June 23rd, 1956?

A. Yes, sir, he tires very easily.

Q. Let me ask you this. We will make these just brief questions. Confining your testimony to prior to June 23, 1956, would the Doctor make complaints like he was making and has been making since that time? A. I am sorry?

Q. Before the injury tell us from your observation how the Doctor got around and carried on his practice and everything? [277]

A. Well, he was much more active before that time.

Q. And was he doing quite a bit of surgery to your knowledge?

A. Yes, and he could do much more work.

Q. How were his office hours then before his injury?

A. Well, they were much later. He has closed oh, an hour earlier at times.

Q. I see. And now confining your testimony to after June 23, 1956, and even up to now, what is the main difference you have observed about him in re-

(Testimony of Mrs. Robert Hargrave.)

gard to his physical condition, comparing it to now and since June 23, 1956, and before that time? The difference you have observed, the major differences?

A. Well, he can't begin to do the work that he did. He can't begin to do the surgery and he can't—in the office he tires—he can't see as many patients and often when he is removing sutures or changing a cast or removing the cast, I recognize that he is in pain because he leaves the room and has to exercise his back.

Q. Did he resort to exercises there at the home when he had that advice from one of the Doctors?

A. Oh, yes, when he went to New Orleans and saw Doctor Wickstrom.

Q. Did you go with him on those trips?

A. Yes, sir, I did.

Q. And did that exercise seem to give him temporary relief? [278] A. Yes, it did.

Q. Just a few weeks ago did you notice anything there in your medical offices in the Hamilton Building? Did you notice anything when Dr. Hargrave was taking care of a patient, anything about the look on his face when he was removing some sutures? A. Yes.

Q. Tell the jury please?

A. When he strains in a particular way it causes his back pain, and maybe that will continue then for a week or three weeks at a time, and then he seems to recover again and is free of pain.

Q. Is he able from your observation to do the same amount of surgery he did prior to his injury?

(Testimony of Mrs. Robert Hargrave.)

A. He——

Mr. Blewett: Mrs. Hargrave, just a minute. I think that is an improper question unless there is foundation laid for it.

Mr. Kouri: I will qualify it, your Honor.

Q. As you are working in the office, and do you handle the books too in connection with the work and accounts?

A. Yes, I do help him with the books.

Q. Then are you in a position to know the amount of surgical and medical work that he does at the hospitals and in the office? [279]

A. No, I couldn't tell you just exactly how much he does.

Q. No, but I am asking you do you keep it in your ledger and books, you look after those, is that true? A. Yes.

Q. Well, then by basing it on what information you have ascertained from them could you tell any difference of the number of patients he was taking care of since the injury and compared to before?

A. It is much less because he hasn't been able to do the work.

Mr. Blewett: Your Honor, again I object.

The Court: The answer is not responsive. It will be stricken.

Mr. Kouri: We withdraw it and ask the jury not to consider the last question and answer. Thank you, your Honor.

Q. Mrs. Hargrave, do you know whether or not

(Testimony of Mrs. Robert Hargrave.)

the Doctor is a member of the staffs on the hospitals there in Wichita Falls? A. Yes, he is.

Q. Now do you know this—and don't answer it if he has an objection. Do you know whether or not he makes the same number of hospital calls since the injury as he did before?

Mr. Blewett: The question is "does she know." That is my understanding. That can be answered.

Q. Just answer that yes or no.

A. Yes, I do know. He doesn't make as many.

Q. Were you helping him in his practice immediately before the war? I mean World War II, or were you taking care of the home?

A. Taking care of the home.

Q. Say in the 40's you weren't doing any work in the office? A. No, sir.

Q. Mrs. Hargrave have you given him any treatment there at home since the accident, from the time you all got back, even up until now recently? Have you treated him yourself?

A. Yes, I have often had to rub his back, if that is what you would call treatment.

Q. Would that seem to give him temporary relief?

A. Yes, that would give him temporary relief.

Q. How often would you do that?

A. As often as once or twice a week, many times in the evening.

Q. Does that seem to give him temporary relief?

A. Yes.

(Testimony of Mrs. Robert Hargrave.)

Q. How are his sleeping habits as compared to the way they were before the injury?

A. He doesn't sleep as well at night as he used to.

Q. How about his nerves? [281]

Mr. Blewett: Wait a minute. Your Honor, I will object to that. There is no qualifications to this witness.

The Court: She can testify to her observations.

Q. From your observation, Mrs. Hargrave, have you noticed any difference about his nerves?

A. Well, he is more nervous, especially when he is in pain.

Q. Has he at times appeared to be irritable?

A. Yes.

Q. Was he that way before the injury?

A. No, he wasn't.

Mr. Kouri: Thank you, ma'am. You may have the witness, Mr. Blewett.

Cross Examination

Q. (By Mr. Blewett): Mrs. Hargrave, did you say something about the exercises the Doctor used to do?

A. Dr. Wickstrom prescribed them.

Q. And how long did Dr. Hargrave continue those, as far as you know?

A. Oh, off and on for several months I know.

Q. Will you describe the exercises that Doctor Hargrave did?

A. I know I can't describe them because I was

(Testimony of Mrs. Robert Hargrave.)

busy with [282] my family and I did not observe them.

Mr. Blewett: That is all. I have no other questions.

Mr. Kouri: That is all.

(Witness excused.)

Mr. Kouri: Your Honor, with that the plaintiff rests. [283]

* * * * *

Mr. Blewett: The defendant will call as his first witness Dr. Russell Richardson.

DR. RUSSELL RICHARDSON

having been duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Blewett): Would you state your name, Doctor? A. R. B. Richardson.

Q. And how old are you? A. I am 59.

Q. And where do you live?

A. Great Falls, Montana.

Q. What is your occupation?

A. I am a Doctor.

Q. And do you have any specialty?

A. I treat injuries for the most part.

Q. You treat injuries? [294] A. Yes.

Q. Do you have any specialty? When you say injuries, does that refer to any type of injury, Doctor? A. Mostly of bones and joints.

(Testimony of Dr. Russell Richardson.)

Q. Does that refer to orthopedics?

A. Yes.

Q. Doctor, where are you associated?

A. I am a member of the Great Falls Clinic.

Q. And where did you go to school?

A. University of Minnesota.

Q. When did you graduate? A. 1928.

Mr. Blewett: And would you admit the Doctor's qualifications or do you want me to go on?

Mr. Kouri: We will admit the Doctor's qualification, yes, sir.

Mr. Blewett: You will admit he is an orthopedist?

Mr. Kouri: Yes, sir.

Mr. Blewett: That will save us a little time.

Q. How long have you practiced surgery and practiced medicine or been as an orthopedic surgeon, Doctor? A. Since 1928.

Q. And where have you practiced all that time?

A. Practically all of it in Great Falls, Montana. I have been here since 1928. [295]

Q. Doctor, did you have occasion recently to examine Dr. Robert Hargrave, who sits to my right in the court room? A. Yes.

Q. Do you know on which date that was you made that examination?

A. I would have to check it. It was on the 19th of January, 1959.

Q. And you made that examination at my request, didn't you? A. That is right.

Q. State whether or not Dr. Hargrave brought

(Testimony of Dr. Russell Richardson.)

with him and delivered to you a group of X-ray pictures which he brought with him, or reported to you he had brought with him from Texas?

A. Yes, he did, and I examined them.

Q. Do you have any idea about how many of those pictures you looked at?

A. I imagine it was between thirty and forty, or maybe more. There was a lot of them.

Q. Doctor, I do not intend at this time to have you identify each of those pictures. I am going to ask you if you don't mind my shortcutting a little bit, but I don't want to hinder your testimony or your desire to answer any questions that may come up, but did you have occasion to examine X-rays which dated from about July 2, 1956, up to the time that you [296] took X-rays or had X-rays under your supervision? A. Yes.

Q. Would you remember if some of the X-rays, or the X-rays you examined were X-rays which were taken by one Dr. Ane, one Dr. VanDeventer, or taken at Bethania Hospital in Wichita Falls? Can you identify those by name at this time, Doctor?

A. I remember examining X-rays which were identified being taken by or at the request of those gentlemen.

Q. And Dr. Hargrave? A. Yes.

Q. For the most part what portion of the body did those X-rays deal with, Doctor?

A. The dorsal spine. That is the part of the body between the shoulders and the waist.

(Testimony of Dr. Russell Richardson.)

Q. Now did you make an examination of Dr. Hargrave yourself? A. Yes, sir.

Q. Would you tell the Court and jury generally here the scope and nature of the examination which you conducted?

A. The examination included a history given by Dr. Hargrave of how the injury occurred, and on his condition following that injury up until the time I examined him; also related facts as he saw fit to give me, and then it consisted of a physical examination which was limited to the most part [297] to the back bone, also involving one foot.

Q. Did you conduct any tests as to reflexes or what you might say objective tests for neurological findings? A. Yes.

Q. Did you take X-ray examinations or X-ray pictures of Dr. Hargrave? A. Yes.

Q. And do you know how many pictures he took or how many pictures were taken under your supervision or direction?

A. Yes, I can't give the number without counting them.

Q. Do you have them with you in Court?

A. I have them with me.

Q. You have the pictures actually taken of Dr. Hargrave while he was in the course of his examination by you? A. Yes.

Q. And did you do anything else in connection with your examination of Dr. Hargrave, and what else if anything that I haven't asked you, did you do in examining him?

(Testimony of Dr. Russell Richardson.)

A. I took a history and examined his X-rays and the ones I took. I also consulted with my associate Dr. Wallgamott.

Q. Was Dr. Wallgamott present when the Dr. was being examined, most of the time?

A. No.

Q. Did Dr. Wallgamott examine the Doctor at any time after you did? [298]

A. We both examined him separately.

Q. Then you consulted? A. Yes.

Q. In connection with your examination of Dr. Hargrave did you have occasion to check his mobility or range of motion in the back area?

A. Yes.

Q. And what do you have to say with reference to your findings on that examination, Doctor?

A. Well, very close to the normal range of motion for a man 54 years of age and a general build like Dr. Hargrave.

Q. In conducting that type of an examination, Doctor, what do you have or what do you request the patient to do?

A. In testing motion of the back and agility of the back, we have them bend forward, backward sideways, and then we have them twist to one side or the other.

Q. In the course of that examination was that done while you were standing by watching the Doctor? A. Yes.

Q. Did he at any time in the course of those movements complain of pain or discomfort to you?

(Testimony of Dr. Russell Richardson.)

A. Let me check my notes. These are notes which I made subsequent to the examination. They are the notes included in the report from Dr. Wallgamott. No, no pain.

Q. Doctor, in the course of your examination of Dr. [299] Hargrave did you ask him to—maybe you have already answered this—did you say you asked him to bend forward? A. Yes.

Q. Now, Doctor, directing your attention to the X-rays which you observed, will you tell the Court and jury at this time as to what condition you observed in the X-ray pictures covering Dr. Hargrave's spine, taken about July 2, 1956?

A. That film is not handy for me to check, is it?

The Court: Yes, they are all here, Doctor.

A. I think I can remember.

Q. We sort of agreed we would hurry through all the X-rays, but I am certainly willing to have you go through the whole thing. The jury has looked at a lot of X-rays.

A. As I recall, the films are——

The Court: 13, 14, 15 and 17 were the first four.

A. I don't want to be misleading, I would just want to check myself. There is another view taken from a different direction.

The Court: I think 13, so that the record would be clear, 13 was taken October 11, 1956.

Q. I think that is right, your Honor.

A. #14 is August 4, 1958.

Q. It should be 19 or 20 according to my notes.

(Testimony of Dr. Russell Richardson.)

The Clerk: 19 and 20 are the exhibits attached to the deposition. [300]

Mr. Blewett: I thought these were in evidence, your Honor.

Mr. Hargrave: Here is another one made on that day.

Mr. Blewett: May it be stipulated these may be introduced at this time?

Mr. Kouri: Yes.

A. This one is dated July 2, 1956.

Mr. Blewett: Let me just introduce it a minute here. This would be Defendant's 30. And this is 31.

The Court: Any objection?

Mr. Kouri: No objection.

The Court: Defendant's Exhibits #30 and #31 are received without objection.

(Whereupon Defendant's Exhibits #30 and #31, being X-rays, were received into evidence.)

Q. (By Mr. Blewett): I am handing you now, Doctor, exhibits Defendant's Exhibits 30 and 31, and I would like for you to look at those and tell the Court and the jury generally the condition of the back as reflected by those X-rays, if you will?

A. I am now looking at an X-ray taken of the back of Dr. Hargrave, taken at the Bethania Hospital, Wichita Falls, Texas. This is an X-ray taken from the back towards the front or the front towards the back. Anyway it is an anterior posterior direction. And this X-ray shows a slight curvature

(Testimony of Dr. Russell Richardson.)

of the spine [301] if you people can see it, in the lower lumbar region, and in the dorsal region, that is the region where you can also see ribs attached. We can see some spur formation, particularly in the regions of the 8th, 9th and 10th dorsal vertebrae, some spur formation and irregularities in the lumbar area. That is the area just above the pelvis. Now this (#31) is a lateral X-ray taken of the same general area, and this X-ray picture shows the same general area of the body, and it shows from the 7th dorsal vertebrae down. Those dorsal vertebrae are all showing some spur formations and irregularities on the body. The 10th dorsal vertebra which is designated #10, shows a narrowing in the anterior portion of the body so that vertebrae so that it is wedge shaped backward forward. That has considerably more of the spur formation and irregularities on its surfaces than the others show. And as we go down we see some spur formation and irregularities also down in the lumbar area. That is usually designated as hypertrophic osteo perosis, or arthritis. In addition to that we see some increase in the dorsal curve. There was more curve than we ordinarily see. We also see some increase in the lumbar curve, which is in the opposite direction, which is usually described in medical terms as an increase in the dorsal curvature and the lumbar lordosis. You don't have to remember those big words. They don't mean any more than increased curves.

Q. Doctor, is that what is sometimes referred to as [302] curvature of the spine?

(Testimony of Dr. Russell Richardson.)

A. No. Ordinarily a lateral curve we think of as you said, curvature of the spine.

Q. Is that the same as a hollow back?

A. Yes, this is the same as a hollow back, the lordosis. That is the same as a hollow back.

Q. From that X-ray, Doctor, do you have an opinion as to whether or not Dr. Hargrave on that date had a normal back?

A. He does not have a normal back.

Q. Now as to the hypertrophic or arthritic changes which you mentioned there, can you or do you have an opinion as to whether or not the arthritis and hypertrophic changes there were prior or antedated June, 1956?

A. They would undoubtedly have.

Q. You can be seated now, Doctor, if you will, unless you want to refresh your observation with those pictures any more.

A. Well, I would like to say we consider this is a compression fracture of the 10th dorsal vertebra.

Q. These pictures show a compression fracture of the 10th dorsal vertebra?

A. That is right.

Q. Now, Doctor, you testified a few moments ago you had occasion to review X-rays which have been taken of and on from that time up until the present time. In those X-rays [303] that you last took or had taken, as well as some of the later X-rays which the Doctor showed you, is there still evidence of a compression of that 10th dorsal? A. Yes.

Q. What is the condition of that vertebra as re-

(Testimony of Dr. Russell Richardson.)

flected to you upon your examination of those latter X-rays? Do you understand my question?

A. Not quite.

Q. Well, I will lead you, and Mr. Kouri can interrupt me any time he wants.

Mr. Kouri: Go right ahead.

Q. What percentage of compression do you find in that 10th dorsal vertebra as of the last X-rays you had taken, and the last X-rays Dr. Hargrave furnished you?

A. Well, there is no change in the amount of compression between the last ones Dr. Hargrave showed to me and the ones we took.

Q. In other words, the condition is remaining static so to speak? A. That is right.

Q. Speaking percentagewise, and taking into account the measurement of the adjacent vertebrae in that area, what percentage of the compression exists in the 10th dorsal vertebra?

A. About 10, possibly 12 per cent.

Q. And did you measure that yourself, Doctor?

A. Yes.

Q. And that is measured with a ruler of some sort?

A. We use a transparent ruler that we can see through, so that the measurement will be more accurate.

Q. And the measurement of a vertebra is made how, in centimeters?

A. Yes, we usually use a metric scale because it is smaller units.

(Testimony of Dr. Russell Richardson.)

Q. And it is your opinion that this one compression, the 10th dorsal, shows about a 10 per cent compression? A. That is correct.

Q. And directing your attention to the series of X-rays from July 2, 1956, up to the present time, what have you to say, Doctor, with reference to the condition of arthritis which you find in Dr. Hargrave's spine?

A. It was present on the first X-rays and it is still present, and the increase was not out of normal expectation for a man of his age group.

Q. There is some increase?

A. There is some increase.

Q. But it is within normal range or limitation or increase for a man of his age?

A. That is right. You understand that people vary considerably as to the rate of change that is is taking place.

Q. Doctor, in your examination of the X-rays, and when [305] I use the word X-rays, for brevity I am going to include all of the X-rays that we have had occasion to consider, did you find any evidence of involvement of the disc?

A. The disc space between the 11th and 12th dorsal vertebrae seems to be slightly narrowed.

Q. Do you have any medical opinion as to what causes that narrowing of the space at that point?

A. Yes, I have neglected to in reading those X-rays—I neglected to call attention to that. I do not know if it shows as well as in some later ones, attention to the defect in the lower surface of D-10,

(Testimony of Dr. Russell Richardson.)

a defect which is commonly known as a smarl. It was felt that the contents of the disc space collapsed into the lower surface of the body of that vertebra, producing that smarl, and that accounts for the narrowing. In other words, it just went somewhere else.

Q. It went into the body of the vertebra?

A. Yes.

Q. State whether or not in your opinion that is a serious or is not a serious situation as far as the disc or the vertebra is concerned?

A. Smarls are not considered to be serious.

Q. Now, Doctor, upon your examination of these X-rays, including the ones of more recent date which show the healing progress in this area, is there any evidence as to what has happened to that disc or the smarl, as you call it? [306]

A. Well, it has gradually filled in and healed.

Q. And that is part of nature's process, isn't it?

A. Part of nature's process. Smarls don't always disappear completely, however.

Q. Has this one disappeared?

A. Apparently so. You don't see it.

Q. On the recent X-rays you can't detect it?

A. That is correct.

Q. Now in this particular fracture, and based upon your examination of the X-rays as well as the neurological tests which you conducted, do you find any evidence of injury to the cord of Dr. Hargrave?

A. No.

Q. I believe you have testified here that there is

(Testimony of Dr. Russell Richardson.)

about a 10 per cent compression of the 10th dorsal here. Will you state your opinion as to how that degree of compression is classified, either as mild, moderate, or severe?

A. It is classified as mild.

Q. A mild compression? A. Yes.

Q. Do you have any idea at this sitting, Doctor, how many compression fractures you have treated in the some thirty years you have been here?

A. It would be several hundred. I have never counted them up. [307]

Q. Have you ever had occasion to find a smart or a compression fracture for a person who did not even know he had it? A. Yes.

Q. In your experience in treating compression fractures have you ever had occasion to treat a compression fracture arising out of or connected with a person riding horseback? A. Yes.

Q. Have you ever had occasion or experience treating a person suffering a compression fracture by riding a horse, and on the basis of the history as related to you by Dr. Hargrave? A. No.

Q. Now did you find any other condition in Dr. Hargrave's spine which might account for his alleged compression fracture as a result of his riding this horse?

A. It appears to me that there is some loss of calcium in the bones of his back, that his bones are not as strong as the average person's bones. We call that osteoporosis. That is not a marked osteoporosis, and osteoporosis is something which is rather diffi-

(Testimony of Dr. Russell Richardson.)

cult to be definite about, because the appearance varies with X-ray techniques, and even changes in the current when the X-rays are being taken. It is my opinion there is some present.

Q. Would you advise the Court and jury here, Doctor, as [308] to where on this 10th dorsal vertebra the major portion of this compression is?

A. It is on the lower surface.

Q. And what surface is that called?

A. Inferior.

Q. From your experience in treating that type of fracture, is it common or rare?

A. It is not nearly as common as fractures in the upper or superior surface.

Q. As far as mobility of the back, not just in the area of the 10th dorsal, Doctor, what have you to say as to the normal or general mobility of a person's back in the area of the 10th dorsal?

A. Very light. The only mobility is probably in twisting, and some lateral bending, but it is relatively immobile because it is held more or less rigid by the ribs.

Q. Actually that portion of the body is not called upon to perform motion or mobility as much as the lower part, is it?

A. That is correct.

Q. Now in the history which the Doctor gave you at the time of the examination, did he mention the type of work he does, Doctor Richardson?

A. Yes.

Q. And do you understand that he is a surgeon and general practitioner? [309]

A. Yes.

(Testimony of Dr. Russell Richardson.)

Q. Taking the Doctor's back condition as a whole, it is defined as kifosis and scoliosis, isn't it?

A. Yes, there is some scoliosis present.

Q. State whether or not that condition could cause the Doctor's stature or general stature to be a little off kilter, or to be a little different than what the normal person is? I am not sure I have given you that question exactly. I would like to reframe it in this way. Does a person with this condition of scoliosis or kifosis have a tendency toward back pain or trouble?

A. Yes, they may have trouble.

Q. In the examination made by you did the Doctor disclose to you any history of previous back trouble up to the present time? A. No.

Q. Did he give any history of previous back trouble at all?

A. Well, not that I recall. (Referring to notes.) I have no recollection of him stating whether he did or did not. Are you referring to before he got hurt or after?

Q. Before June 23, 1956?

A. I haven't got any record in my notes, and I don't recall. It was my recollection he said it did not bother him, but I wouldn't be sure he did say that. [310]

Q. This condition of scoliosis and kifosis you find in the X-ray, would you direct your attention to that and state approximately how long it has been present in the back, if you can?

A. Well, it was practically all his life.

(Testimony of Dr. Russell Richardson.)

Q. Is that what is known as a congenital condition? A. Postural would be better.

Q. A postural condition?

A. Yes. Congenital refers to things people are born with. I wouldn't say for sure this was congenital.

Q. Doctor, bearing in mind the condition of the Dr's back as it is reflected to you in these X-rays, isn't it possible he could have back pain even without regard to this compression fracture that you noted? A. Yes, he could have.

Q. Do you have an opinion as to what duties a surgeon and physician in general practice such as the Doctor has described, can't do because of the condition in the 10th dorsal vertebra here?

A. I think he would be able to do all the things I can think of.

Q. From your opinion there is nothing he can't do in the way of his practice as a physician and surgeon? A. That is right.

Q. Now, Doctor, tell the Court and jury, if you will, [311] approximately what time of the day you get tired in your work as a surgeon?

A. Oh, about four thirty or five.

Q. Four thirty or five?

A. Yes, sometimes earlier.

Q. May I ask you this, Doctor, will you check your notes and see if Dr. Hargrave gave you any history of a foot condition?

A. Yes, he stated that he had a numbness in the instep and arch of his left foot, tingling sensation,

(Testimony of Dr. Russell Richardson.)

described it more of a tingling rather than a numbness.

Q. Do you have any opinion as to whether his left foot could be connected with the 10th dorsal vertebra? A. It couldn't be.

Q. It couldn't be?

A. It couldn't be even though there were a cord injury at that level.

Mr. Blewett: We have no other questions.

Cross Examination

Q. (By Mr. Kouri): Doctor, I believe you have stated you are 59? A. That is right.

Q. And that you leave your office somewhere between four thirty and five? [312]

A. No, I get tired at that time.

Q. I thought that is what you testified on direct examination.

A. I testified I got tired at four thirty or five o'clock, not that I left the office.

Q. When you were 48 years old did you get tired between four thirty and five?

A. No, I began noticing it when I was around 50, and a little beyond there, during the last seven or eight years.

Q. Now how many X-rays did you take, Doctor?

A. I can count them up. I don't remember.

Q. Don't you remember how many you took off hand?

A. I think I had five taken, and my partner took two or three more.

(Testimony of Dr. Russell Richardson.)

Q. You found that narrowing of space, didn't you? You found the narrowing of the intervertebral disc or interspace between thoracic vertebrae 10 and 11, didn't you? A. Correct.

Q. Did you make a measurement of thoracic vertebra #10? A. As to its width?

Q. Yes. A. Yes.

Q. I have here, Doctor Richardson, Plaintiff's Exhibit #16. What were your findings with regard to the width of thoracic vertebra #10? [313]

A. You mean the thickness?

Q. The width or thickness, yes, sir.

A. I don't recall the exact centimeter measurement now. I wouldn't try to give it to you. I reduced it to a percentage, which satisfied myself.

Q. How much difference was there in the width of #10 and the one above, being T-9 and the one below being T-11?

A. There was approximately 10 per cent difference on an average, 10 or 12.

Q. That is the vertebra that was depressed, T-10, is that not true? A. Yes.

Q. And in your report you found from reading these other X-rays that on the X-rays that were made in July of '56, in comparing those with the X-rays made in August, 1957, there had been more compression?

A. There had been slightly more, that is correct.

Q. You noted the spurring and the lipping also, did you not? A. Yes.

(Testimony of Dr. Russell Richardson.)

Q. And you noted the narrowing, as I asked you a moment ago, of the space? A. Yes.

Q. That is the disc area there?

A. The disc area is the space between. [314]

Q. Yes? A. Yes.

Q. What per cent was it narrowed in comparison to the vertebra below it, the 11th one?

A. I wouldn't be able to give you the percentage. It appears narrower.

Q. It is quite notable, isn't it?

A. It appears narrower, yes.

Q. And also you did not perform a myelography on the Doctor? A. No.

Q. That would have enabled you, wouldn't it, to have determined whether or not that disc between T-10 and T-11 was herniated or ruptured or damaged, wouldn't it?

A. Yes, it would, surely. We wouldn't ordinarily do it with his group of symptoms, but if it had been indicated we would have.

Q. That is the technical way of ascertaining the exact area in the spinal column whether a disc is concerned or ruptured, isn't that true?

A. You are correct. We don't ordinarily. We wouldn't consider doing a myelography under the circumstances.

Q. But that is the technique you would use, isn't that true? A. That is right. [315]

Q. Now on these tests that you made with reference to the bending now in your report, I am referring to you and Dr. Wallgamott, you stated a

(Testimony of Dr. Russell Richardson.)

straight leg raising at 85 per cent produces some tightness of the back? A. That is right.

Q. And you, going on further from the paragraph under your examination, disturbance of sensation to cotton and pin prick is present over the medial aspect of the left lower leg?

A. Now I did not do that test so I am not able to answer you.

Q. I thought you told on direct examination you and Dr. Wallgamott were in consultation and made your examination together?

A. That is correct, but remember I also testified that I wasn't in the room when he examined him, and he wasn't in the room when I examined him.

Q. You were not in the room for the leg raising test and other test?

A. I have my own notes on that. I concur in that. I did not do that particular test. That is, I did not compare the left foot with the right.

Q. Did you find this, a little tenderness is present—the test on the left foot? A. Yes.

Q. X-rays of the dorsal and lumbar spine had been required [316] by Dr. Richardson, and I had a request for an X-ray of the left foot. That is under Dr. Wallgamott's signature? A. Yes.

Q. And that is true, isn't it, about the request on the X-ray of the left foot?

A. That is right.

Q. Now, Doctor Richardson, you knew that Dr. Hargrave at the request of the defendant through

(Testimony of Dr. Russell Richardson.)

his attorney agreed to come over and subject himself to an examination by you at your clinic?

Mr. Blewett: I don't know whether that is competent or material, and I object. The law distinctly gives us the right to do that.

The Court: I think that is right. Objection sustained.

Q. (By Mr. Kouri): Now in regard to that numbness that he related, Doctor, that lower extremity, will you please tell us, Doctor, the origin of the sciatic nerves? What part of the spinal column they originate from?

A. The second lumbar down.

Q. Then do they radiate down the lower nerves?

A. Yes.

Q. Do they radiate from all of the five lumbar vertebrae?

A. Nerves come from all five of them, yes. [317]

Q. If there was some involvement of the nerve around lumbar vertebra 4, involvement I mean pinched, would the pain radiate down the lower extremity?

A. Yes.

Q. If it was #4 could it stop at the knee or would it then go on below into the calf and on down?

A. Well, there may be some variation in distribution, but ordinarily to get down to the foot that is lumbar #5.

Q. From lumbar 5? A. Yes.

Q. Between 4 and 5?

A. Between 5 and S-1.

(Testimony of Dr. Russell Richardson.)

Q. Between 5 and S-1? A. Yes.

Q. Anyway the pain could radiate down if the involvement is in the proper area, at the lumbo sacral area, the pain would radiate like down to the toes? A. Yes.

Q. Now, Doctor, how do you account for the fact that he has this numbness which only had originated since the time of this injury, in that particular foot? What else could you attribute it to?

A. I don't quite get the gist of your question.

Q. Let me rephrase it?

A. I would like to be as helpful as I can. [318]

Q. Certainly, thank you. He related to you about the numbness, did he not? A. Yes.

Q. Did he say something about a tingling in the foot? A. That is correct, yes.

Q. You made X-rays of it?

A. That is right.

Q. At least like you said in the report, you all were concerned enough you wanted to make X-rays of the foot? A. That is correct.

Q. Now my question is this, Doctor, how do you account medically speaking for the fact of the numbness and the tingling when he at the same time has the injury in his lower back?

A. Well, these complaints with regard to the 12th dorsal vertebra.

Q. I am excluding that?

A. On the basis—let me answer you this way. On the basis of what Dr. Hargrave related to me regarding his other complaints and on the basis of the

(Testimony of Dr. Russell Richardson.)

physical examination we made of him and the X-ray examination we made of him, I would be totally unable to account for the numbness in his left foot.

Q. Doctor, didn't he relate to you at the time of the injury that he felt two pops in his back, one in the upper and one in the lower part. Did he relate that to you? A. Yes. [319]

Q. The lower part, that is the lumbo sacral part?

A. Yes, but he does not have the usual signs or symptoms that we could consider a disc lesion in the lumbo sacral region.

Mr. Kouri: Now, of course, I am not in a position here, your Honor, to cross examine with the report part of it being made by another Doctor, so on these tests that were made I will have to skip them.

Mr. Blewett: Have you read Dr. Wallgamott's report?

A. I have glanced through it.

Mr. Blewett: I am perfectly willing that the Doctor talk on it.

Mr. Kouri: I don't want to take any more time, if they will stipulate on this report like we did on the others, that will be satisfactory.

Mr. Blewett: Yes.

Mr. Kouri: Very well.

Q. (By Mr. Kouri): Doctor, how much permanent disability is Doctor Hargrave going to have?

[No answer in copy.]

Q. Out of 100 cases let's say like this, say that you have had, that you have read about in authoritative medical works, out of 100 cases what per cent

(Testimony of Dr. Russell Richardson.)

out of those will become totally and permanently disabled?

Mr. Blewett: Wait just a minute. Your Honor, I object to that as being an improper question. It is not [320] directed to any issue involved in this particular litigation. If Mr. Kouri wants to limit his question to a compression fracture of this nature, of the size and stature of Dr. Hargrave, I have no objection.

Mr. Kouri: I am going to ask him about this authority. I am sure Dr. Richardson is familiar with it.

A. I wouldn't be able to say.

Q. Doctor, are you familiar with the work Key and Conwell? A. I have read the books.

Q. They are authorities, are they not, in the orthopedic field, at least were? I understand they are dead.

A. I am familiar with their work. They are well thought of. Dr. Key is dead. Doctor Conwell is still alive.

Q. Are you familiar with Dr. Philip Wilson, Professor Emeritus, Northwestern University?

A. Yes, sir, I have read some of his work.

Mr. Blewett: Just so we understand, your Honor, there is some question in the law as to whether those can be read into the evidence.

The Court: I think my understanding of the rule is that a witness may be cross examined on a textbook if he has stated that his opinion is based on the study of textbooks in question.

(Testimony of Dr. Russell Richardson.)

Mr. Blewett: I don't think that has been done, your [321] Honor. I was going to object to it.

Mr. Kouri: I did not understand the Court.

The Court: I think the rule is that a medical witness may be cross examined if a foundation is laid that he is basing his testimony on his own experience and also on textbooks that he has read.

Mr. Kouri: That is the question I had asked him, based on his observations of fractures plus medical authorities he had read. I will reframe it if the Court likes.

The Court: Would you lay that foundation and I will permit him to answer.

Q. Doctor Richardson, I will ask you this. On not only compression fractures, but fractures of the spine, taking 100 cases say you have had and the cases you have read about in the medical authoritative textbooks, those that have been recognized, out of 100 how many would you say out of that 100 would be totally and permanently disabled?

Mr. Blewett: Wait a minute, I object.

The Court: Objection sustained. I don't think you have laid a foundation that the basis of his testimony is from the textbooks he has read.

Q. All right, I will put it this way. Do you agree, Doctor, that out of 100 cases that you have had that 23.5 per cent were totally and permanently disabled of fractures of the spine? [322]

Mr. Blewett: Your Honor, I move that the question be stricken and the jury admonished. There

(Testimony of Dr. Russell Richardson.)

has been no foundation for the question which Mr. Kouri has made.

The Court: I think you have to limit it to the injury here. I don't think you can say fractures of the spine. If you say compression fractures I will let him answer.

Mr. Kouri: We except to the Court's ruling.

The Court: I think you will have to lay a further foundation.

Q. (By Mr. Kouri): Doctor Richardson, how many cases of this nature, compression fractures, have you had say in the past five years or ten?

A. Any answer I would give would be a guess. I don't keep any statistical record. That would be like asking how many something else I had.

Q. About how many in the last ten years?

A. Now what type of compression fractures are you speaking of now?

Q. Let's say mild and moderate, all of them, minimal, mild and moderate?

A. Which area, all areas?

Q. All areas, or better, the thoracic area?

A. Oh, this is purely a guess. I don't know if it is any good to anybody. I don't even swear it is right to myself. I suppose somewhere around 20.

Q. What percentage of those were permanently disabled?

Mr. Blewett: Your Honor, I again object. There is no proper foundation for this unless he shows the circumstances to be somewhere similar to here.

Mr. Kouri: I am trying to do that now.

(Testimony of Dr. Russell Richardson.)

Mr. Blewett: I think he has got to go a little further with his foundation and show the type of work and so on. I will withdraw the objection. Let the Doctor go ahead and answer.

Q. Go ahead, Doctor.

The Court: You may answer.

A. I am trying to think. In the last five years?

Q. Five or ten, yes, sir.

A. Well, it makes a lot of difference.

Q. Let's go to the last ten years, Doctor?

A. I think two.

Q. Two out of twenty?

A. Something like this. This is all guess. Remember everything I am telling you is guess, and the best of my memory.

Q. Is this based on five or ten years?

A. I think two in the last ten years, in the dorsal spine location. These were both complete fractures.

Q. What about the lumbo sacral area, how many would you say out of that twenty? [324]

A. Of course, you see more of those——

Mr. Blewett: Your Honor, I would like to get the record straight. As I understand, even on the plaintiff's case the most favorable testimony he has is about a thirty per cent fracture of the 10th dorsal. I don't see the competency or relevancy of any other back injuries.

The Court: As I understand this last question, the Doctor said this was where there was a frac-

(Testimony of Dr. Russell Richardson.)

ture or dislocation with paralysis of the body, the lower level of the body? A. Yes.

The Court: It seems to me it should be limited to the type of fracture that was claimed here.

Mr. Kouri: Yes, sir, I know, but the interrogation had been going on the thoracic and lumbar area. In the interest of time I will withdraw that last question.

A. If it would help you out, if you wanted me—if you wanted to ask me about comparable fractures of that area I could answer you very easily, if it would be any help to you or to the Court.

Q. Well, Doctor, you say you have a copy of the report, the copy of the report that you and Dr. Wallgamott prepared together, and he signed, is that right? A. No.

Q. Do you have a copy with you?

A. I have nothing to do with the writing of this report. [325]

Q. This question and then we will conclude this cross examination. This last short paragraph, will you follow me while I read it to the jury, and see if you concur in it? The last paragraph. It is my belief that Dr. Hargrave did sustain a mild compression fracture of the 10th dorsal vertebra as a result of the injury described on June 23, 1956, and that this fracture has now healed completely; the presence of osteoporosis which antedated the injury could well contribute to his present symptomatology. On the basis of objective clinical findings at this time no explanation for the symptomatology is

(Testimony of Dr. Russell Richardson.)

found which is described. On the basis of X-ray findings, however, it is my opinion that such symptomatology may be justified and explained by the compression fracture of the 10th dorsal vertebra and the osteo arthritis present. Do you concur with him in that?

A. In general, yes.

Q. Now this, and then I will conclude. In regard to the osteo arthritic condition, if we had it before and it is in a dormant stage, certainly an injury like the Doctor received on this horse could have caused it to flare up and aggravate it and result in the condition which you found here yesterday or the day before?

A. I don't quite follow you.

Q. In all reasonable medical certainty, Doctor?

A. I am not arguing with you. I did not quite follow you. [326]

Q. If he had the arthritic condition before. Incidentally we all have it from a certain age?

A. I have about as much as the Doctor has.

Q. If he had the arthritic condition before June 23, 1956, through this trauma on the horse it would result in an aggravation and injury to that area in the spine, it could aggravate the condition which resulted in what you found on your examination in regard to the arthritis, could it not?

A. Yes, it could.

Q. Now, of course, Doctor insofar as the injury you do not know whether he was thrown forwards or backwards on the horse?

(Testimony of Dr. Russell Richardson.)

A. Of course not. I was not present at all and he can't tell me.

Q. And using just a matter of logic, if a horse would bolt, naturally the body would go backward wouldn't it, using common sense?

Mr. Blewett: Your Honor, I object to that as assuming a state of fact in this case that hasn't yet been shown.

The Court: Well, I will let him answer.

A. Well, I have ridden quite a few horses and had them bolt. I always went forward. My natural muscle reaction was to go forward, and I don't see how he could get a compression fracture going backward.

Q. You did conclude in your report that the compression [327] fracture was due to the injury on the horse? That is what you said in the report?

A. I can't argue with that.

Q. No, you can't.

A. I didn't want to.

Mr. Kouri: That is all.

Redirect Examination

Q. (By Mr. Blewett): Doctor, I believe you testified on cross examination you would give Doctor Hargrave about 10 per cent disability rating at this time? A. Yes.

Q. Would that include the entire back condition he has, the scoliosis, curvature and arthritis?

A. Yes, I can't separate them.

Mr. Blewett: That is all.

(Testimony of Dr. Russell Richardson.)

Recross Examination

Q. (By Mr. Kouri): Doctor, you are going to send a bill for examining, for your services, and for your testifying here to the defendant?

Mr. Blewett: I object to that as incompetent, irrelevant and immaterial. [328]

The Court: I think it is clear he testified here for the defendant. I presume he sent his bill to the defendant.

Mr. Blewett: I will pay you for the examination, Doctor.

The Witness: Yes, where am I going to send the bill.

Mr. Kouri: That is all.

(Witness excused.)

The Court: Court is now adjourned until 9:30 tomorrow morning. (Jury admonished.) Court is adjourned until 9:30 tomorrow morning. (5:15 P.M.)

January 23, 1959, 9:30 A.M.

The Court: You may proceed.

Mr. Blewett: We will recall Mr. Dillon, if you please.

VIRGIL T. DILLON

having been previously sworn, was recalled and testified further as follows:

Direct Examination

Q. (By Mr. Blewett): Would you state your name again, Mr. Dillon? A. Virgil T. Dillon.

(Testimony of Virgil T. Dillon.)

Q. And are you the same Mr. Dillon who has heretofore testified in this action? A. Yes, sir.

Q. Now, Mr. Dillon, I understand from the examination of you by Mr. Kouri earlier in this trial that you stated that these horses were trained to follow? A. Yes, sir.

Q. Will you explain to the Court and jury a little more fully what you mean by a horse being trained to follow, as distinguished from a lead horse?

A. Well, about the only thing I can say about a horse is there are some horses that make lead horses and some horses that won't go down the trail unless another horse is in the lead. So those are the type of horses we have to follow the lead horse.

Q. Well, when you say a horse will follow another horse, did you mean to imply or infer that one horse will do anything and everything any other horse will do? A. No, I don't mean that.

Q. If a horse would stand on its front hoofs, the horse behind wouldn't necessarily follow, would it? A. No, sir.

Q. On this return trip from Josephine Lake where do the horses go? A. To the hitch rack.

Q. And do they get fed or watered?

A. No, sir.

Q. Now, Mr. Dillon, directing your attention to June 23, 1956, and the point where there was some conversation between you and the Doctor as to his getting off his horse, will you tell the Court

(Testimony of Virgil T. Dillon.)

and jury at this time where to the best of your knowledge this conversation took place?

A. It was just beyond the road into the Hotel. It was I would say we took the horse trail back after we got off of the road to the hotel, that was the service road.

Q. This conversation took place on a horse trail as it left the service road? A. Yes.

Q. I believe you testified on direct examination—maybe you didn't—I am not trying to put words into your mouth, but [331] it is my recollection you mentioned this road on your examination by Mr. Kouri, this service road? A. Yes.

Q. Is that the one you had in mind?

A. Yes.

Q. Did the Doctor at the time of this conversation, or at any time from the time you saw the Doctor until they left the hitching post after the ride, ever say anything to you about running your horse, or accuse you of running your horse?

A. No, sir.

Q. The fact of the matter is, Mr. Dillon, did you or did you not run your horse?

A. No, sir.

Q. Now can a horse such as Skeeter on a trip like this be held back by the person riding him?

Mr. Kouri: I believe we will object to that as it invades the province of the Court and jury and calls for a rank conclusion.

The Court: Objection overruled.

Mr. Kouri: Exception.

(Testimony of Virgil T. Dillon.)

A. Will you repeat that?

Q. My question was can a horse such as Skeeter be held back by the person riding him?

A. Yes.

Q. Now, Mr. Dillon, have you worked with horses in a [332] park concession not only for Mr. Wellman, but for anybody who ran horses in the park?

A. My first year there was in '32.

Q. 1932? A. Yes.

Q. And have you been there ever since?

A. No, sir.

Q. And what period of time were you not there?

A. From '41 to '45.

Q. And where were you in that period of time?

A. In the army.

Q. Except for that spell in the army have you been operating horses with a concession in the park?

A. Yes.

Q. What is your custom or what is your practice with walking or running horses when you have a party like that?

A. It is my practice never to run a horse with a party.

Q. Do you remember whether or not Ann asked you to run this horse? A. No, she never.

Q. Your testimony is she didn't?

A. She didn't, yes.

Mr. Blewett: I believe that is all.

Mr. Kouri: No questions.

The Court: That is all.

(Witness excused.) [333]

Mr. Blewett: Would you call Mr. Higgins please, Mr. John Higgins.

JOHN C. HIGGINS

having been duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Blewett): Would you kindly state your name? A. John C. Higgins.

Q. And what is your address, Mr. Higgins?

A. At the present time it is West Glacier.

Q. West Glacier, Montana? A. Yes.

Q. And what is your occupation?

A. Supervisory park ranger.

Q. And where do you live in the summer months?

A. At the present time I live at West Glacier year round.

Q. Year round? Do you spend any time at Many Glaciers? A. Not since 1956.

Q. Will you tell the Court and jury what your duties were on June 23rd of 1956?

A. I was the ranger in charge of the Many Glaciers area.

Q. The Many Glacier area? A. Yes, sir.

Q. Generally what did those duties consist of, if you can briefly tell? [334]

A. It would have been the management of the Many Glacier area, the protection of the people and protection of the Park.

Q. Well, did you cover the trails? A. Yes.

(Testimony of John C. Higgins.)

Q. And just acquaint yourself with operations in that general area?

A. It was responsibility for the entire operation.

Q. Now approximately how many times have you been over the Josephine Lake trail?

A. Oh, in excess of fifty times.

Q. And are you familiar with the trail?

A. Yes, sir.

Q. Are you familiar with each point of it from the time you leave the hitching post until you get to the Lake and back?

A. Yes, sir.

Q. Now, Mr. Higgins, are you familiar with the area in what we will call the immediately vicinity of the Many Glacier Hotel?

A. Yes, sir.

Q. And the hitching post that is used by the Wellmans in their horse operation?

A. Yes, sir.

Q. Are you familiar with a land mark, natural monument we will say, known as Mount Wilbur?

A. Yes, sir. [335]

Q. If you were to see a picture of that mountain could you with good degree of accuracy ascertain where on the Josephine Lake trail that picture was taken from?

A. If it showed additional land marks I could.

Q. If you saw a picture that showed land marks in that area you could?

A. I could give you the approximate location.

Q. At this time. Mr. Higgins, I would like to show you what has been introduced in this case as

(Testimony of John C. Higgins.)

the Plaintiff's Exhibit #10, and when it is flashed on the screen I would appreciate it if you would tell the Court and the jury what you think that picture is? Can you identify that picture, Mr. Higgins? A. Yes, sir.

Q. What is that picture?

A. Well, it is a picture of Mount Wilbur, and it is taken from very close to the service road, off the service road probably. It is from south of the Hotel. I can tie it down pretty close.

Q. Will you step up with a pencil and point out to the Court and the jury the land marks by which you can identify the picture, from your knowledge and background of that area?

A. This is my house right here (indicating). And this is a bay that is south of the hotel. Here is a point. That is the largest point that extends out into the bay. There is the summit of Mount Wilbur. The approximate line of sight is [336] running through there. That is the mouth of Swift Current Creek. This right here (indicating) from this house to this point, that gives you two real good land marks there.

Q. Where in reference to your house is the picture, where is your house?

A. The house is roughly right there in the center of the picture.

Q. And from your knowledge of the terrain there all through that area on the trail—let me ask you this. The picture had to be taken from this side (indicating)?

(Testimony of John C. Higgins.)

A. Yes, it is from the east side of Swift Current Lake.

(At this time Defendant's Exhibit #33, being a map was marked by the Clerk for identification.)

Q. Handing you what is now marked for identification as the Defendant's Exhibit #33, Mr. Higgins, would you be kind enough to tell the Court and jury what that is?

A. This is a sheet from our trail book. It shows the location of the trails in the Many Glaciers area. It is from the trail book in use in the Park.

Q. That is a sheet or map or drawing of not only the trails, but what else does it include?

A. It shows the entire Many Glacier developed area. That is the title of it.

Q. Does that show also the trail known as the Josephine Lake trail? [337]

A. It shows the position of it near the Many Glacier Hotel.

Mr. Blewett: We would like to introduce Defendant's Exhibit #33.

Mr. Kouri: Is it drawn to scale? If it is I don't think we will have any objections?

Q. Is it drawn to scale?

A. No, it is not drawn to scale. It is an accurate representation as sketched.

Mr. Kouri: We have no objection.

The Court: Defendant's Exhibit #33 is received without objection.

(Testimony of John C. Higgins.)

(Whereupon Defendant's Exhibit #33, being a map, was received into evidence.)

Q. (By Mr. Blewett): Will you, Mr. Higgins, now mark on Defendant's #33 approximately where you would locate the Doctor when the picture we just showed you was taken? You can assume for the purposes of this question and what you are about to do, that the Doctor testified that this was the last picture which he took on the return trip and that he took this while seated on a horse with a camera at eye level, while seated on a horse.

A. (Marks.)

Q. You might initial that, if you will, after you mark it. [338]

A. (Marks and initials.) I just marked it with an X and put my initials to the side of it.

Q. Mark there also where the Doctor was when he took the last picture, which has been identified as Exhibit #10?

Mr. Kouri: We object to that. That would call for a rank conclusion for this witness to testify where the Doctor was. Certainly the Court is not going to allow this witness to surmise where the Doctor was on June 23, 1956.

The Court: I am not sure the question shouldn't be limited where that particular picture was taken, rather than where the Doctor was when he took it.

Mr. Blewett: I thought that was my question. From his land marks and knowledge of the area he could tell where the picture was taken.

The Court: I think it should be limited.

(Testimony of John C. Higgins.)

Q. If I did not ask that, I meant to. Mr. Higgins, does this mark on the map indicate the approximate point from where that picture was taken you just saw?

A. Yes, sir, that was my interpretation of your question, where that picture was taken from.

Q. You did not understand me to say where the Doctor was? A. No.

Q. I did not mean to. If I did, I am sorry. Now directing your attention again, Mr. Higgins, to Defendant's Exhibit #33, [339] I will ask you if you can identify on there what is referred to as the trail which leads to the hitching post from the service road?

A. Yes. As I understand, you want the trail from the service road to the hitching post on this?

Q. As best you can?

A. I will just parallel it with this.

Q. Now directing your attention, Mr. Higgins, to Defendant's proposed Exhibit #34, I hand you Defendant's proposed Exhibit #34, and ask you if you will tell the Court and jury whether or not that is an accurate representation of the Many Glaciers area, including the terrain, on June 23, 1956?

A. Yes.

Mr. Blewett: I offer Defendant's proposed #34 in evidence.

Mr. Kouri: No objection.

The Court: Defendant's Exhibit #34 is received without objection.

(Testimony of John C. Higgins.)

(Whereupon Defendant's Exhibit #34, being a photograph, was received into evidence.)

Q. Now directing your attention to Defendant's Exhibit #33, would you mark on Defendant's Exhibit #34 the approximate point where the picture which you have just seen was taken? Do you want to do that in ink?

A. It would probably look better. [340]

Q. Mr. Higgins, from the point where you have marked the X until the point where that trail takes off, approximately how far is it from the X to the point where that trail takes off the service road?

A. It would be not in excess of twenty yards. It would be less than twenty. Twenty would be your outside measurement there.

Mr. Blewett: I believe that is all, Mr. Higgins.

Cross Examination

Q. (By Mr. Kouri): Of course, Mr. Higgins, on the map there and from your testimony, placing the various points there from the land marks, those are approximations aren't they, your best estimate?

A. Very close approximations.

Q. And that is as you told us, that map is not drawn to scale?

A. It is an accurate representation.

Q. Now you have been in the capacity of which you have described to us here in that park for how many years?

A. In my present capacity for five years.

Q. You are very familiar naturally, aren't you,

(Testimony of John C. Higgins.)

Mr. Higgins, with the area, especially during the summer months?

A. With the Many Glacier area, yes. [341]

Q. The season usually is from June through probably the middle of September, isn't it, when many of the tourists come?

A. Your heavy use season.

Q. How do you go about in your duties? Do you go by vehicle?

A. Vehicle, foot and horseback.

Q. I see. You have, of course, been up the trail which is involved here in this case, from the Hotel or hitching post going up to Lake Josephine?

A. Yes, sir.

Q. I presume you have ridden it many times up and back? A. Yes, sir.

Q. It is wide at first, is it not, say approaching from the hotel?

A. Approaching it from the hotel?

Q. Yes, sir?

A. Leaving the hitch wrack itself?

Q. From the hitch wrack, yes, sir?

A. That trail has a tread—the width of the trail there would be three feet from center line. It would be approximately a six foot tread on that.

Q. It is an old wagon trail, isn't it?

A. No, not the trail as it leaves the hitch wrack. That was your question, wasn't it, from the hitch wrack?

Q. One portion of it is part of an old wagon trail, isn't it? [342]

(Testimony of John C. Higgins.)

A. You are talking now about the service road and the portion of it which is the service road?

Q. You go from the hitching wrack to the service road and then you hit the trail, is that right, or am I in error?

A. Taking it in order, you go on the hitch wrack, then the trail, then service road and back on the trail. The service road comprises part of the trail.

Q. From the hitching wrack to Lake Josephine how many trails are there that you could go on? Are there more than one? A. Yes, sir.

Q. Is it possible to take one say going to the Lake and come back by another?

A. There are three main trails, two that are used by horses and one is a foot trail.

Q. Let's confine this to the ones used by horses. What are the names of those two trails that they use horses on?

A. The lower one which this service road comprises, goes to the foot of Josephine Lake and is called the Josephine Lake trail. The other one is the Piegion Pass trail. There is a cut down to the other trail to the foot of the lake.

Q. You have ridden up and down the Josephine Lake trail many times, haven't you?

A. Yes, sir.

Q. Usually in the month of June as you ride through it [343] there is quite a bit of foliage, trees along the trail is there not? I don't mean all the way?

(Testimony of John C. Higgins.)

A. Not too much yet in June. You are talking about the annual plants growing up green?

Q. I am talking about all the annual plants?

A. Your plants along the side of the trail haven't had much chance to grow.

Q. What about the trees?

A. Yes, you have the trees.

Q. And say riding back, I know you are oriented on it because you have been up there many years, walking or riding back on that trail on your right the foliage and trees would obstruct your view would it not?

A. At what point? It varies.

Q. I don't mean all the way, but at many places along the trail there is lots of trees as you so stated a moment ago, riding back toward the hotel?

A. Yes, it would obstruct a view sideways, off into the timber.

Q. Wouldn't you have more opportunity to have a better view on clearings to your left coming back to the hotel at various intervals? A. No, sir.

Q. Well, are there any clearings at all coming back say looking to your left, where you can view the Lake? [344]

A. Yes, where you can view Swift Current Lake?

Q. Yes, sir?

A. One partial clearing where you can see a portion of the lake.

Q. Mr. Higgins, would you mind stepping here in front of the jury. I know this map is not an

(Testimony of John C. Higgins.)

enlargement. Now on this map here which you can tell is drawn to scale, in this area here (indicating) point out to the jury the location of the hotel, where it is?

A. The hotel is a little black line right along there.

Q. Now if you will just point out where Josephine Lake is to the jury?

A. This is Lake Josephine here (indicating).

Q. And how far would you say it is from Lake Josephine to the Hotel approximately?

A. From where the trail hits the foot of Lake Josephine to the Hotel?

Q. Yes, sir?

A. Approximately a mile and one-tenth.

Mr. Kouri: That is all, Mr. Higgins. Thank you.

Mr. Blewett: That is all.

(Witness excused.) [345]

Mr. Blewett: We will rest.

Mr. Kouri: Your Honor, the plaintiff closes.

The Court: Well, I think we had probably better just excuse the jury subject to call. Court will be in recess for at least fifteen minutes, and the jury will keep in mind the admonition I have heretofore given, you are still not to converse among yourselves or with anyone else regarding this case, or form or express an opinion until it is finally submitted to you. Court is now in recess subject to call (10:10 A.M.)

(Whereupon, pursuant to recess, court was resumed at which time plaintiff, defendant, all counsel, and all members of the jury were present.)

The Court: Each side will be given one hour for argument. Plaintiff's opening argument.

(At this time Mr. Kouri presented argument to the jury on behalf of the plaintiff.)

The Court: Defendant's argument.

(At this time Mr. Blewett presented rebuttal argument to the jury on behalf of the defendant.)

The Court: Plaintiff's closing argument.

(At this time Mr. Bretz presented rebuttal argument to the jury on behalf of the plaintiff.)

The Court: There are just one or two matters I think it might be well to take up with counsel in the absence [346] of the jury, one or two rulings, so I will first excuse the jury. (jury admonished) We will resume at 1:45. The jury is excused until 1:45. I will ask counsel to remain for just a moment.

(At this time the jury left the court room.)

The Court: I have heretofore advised counsel informally, but it should be a matter of record, that the motion to amend the complaint is denied.

Mr. Kouri: Which we except to, your Honor.

The Court: Now the clerk calls my attention to the fact that exhibits 20 and 32 were not received in evidence. That would be the mortality table, and exhibit 32 was the Great Falls Clinic report. I had overlooked the fact myself.

Mr. Blewett: I have no objections to the mortality table, your Honor. The record may show that the record may be corrected to show that both exhibits are admitted in evidence.

Mr. Kouri: We have no objections.

The Court: The record then is corrected to show Exhibits 20 and 32 are received without objection. That is all I had.

(Whereupon Exhibits #20 and #22, being a mortality table and a report from the Great Falls, Clinic, were received into evidence.)

The Court: Court will now be in recess until 1:45. (12:05 P.M.) [347]

(Whereupon at 1:45 P.M., pursuant to recess, court was resumed, at which time plaintiff, defendant, all counsel and all members of the jury were present.)

Instructions To Jury

The Court: Ladies and Gentlemen of the Jury:

Now that you have heard the evidence and the argument of counsel, it becomes my duty to instruct you as to the law governing the case. It is your duty as jurors to follow the law as stated in the instructions of the court, and to apply the law so given to the facts as you find them from the evidence before you. You should not single out one instruction alone as stating the law, but must consider the instructions as a whole. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your duty to base a verdict upon any other view of the law than that

given in the instructions of the court. On the other hand, you are the sole judges of the facts, and you must determine the facts for yourselves solely upon the evidence presented at this trial.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the complaint of the plaintiff, Dr. Robert L. Hargrave, and the answer thereto of the defendant, E. G. Wellman. You are to perform this duty without bias or prejudice as to either [348] party. The law does not permit jurors to be governed by sympathy, prejudice, or public opinion. The parties and the public expect that you will carefully and impartially consider all the evidence, follow the law as stated by the court, and reach a just verdict, regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. The law is no respecter of persons; all persons stand equal before the law, and are to be dealt with as equals in a court of justice.

In these instructions I will first state some general rules or principles of law which are applicable to all civil cases, and then I will instruct you more specifically on the law applicable to this particular case.

Whenever in these instructions I state that the burden, or the burden of proof, rests upon a party to prove a certain allegation made by that party, I mean that unless the truth of that allegation is

proved by a preponderance of the evidence, you shall find that allegation to be not true.

The term "preponderance of the evidence" means the greater weight of the evidence. In other words, such evidence as, when weighed with that opposed to it, has more convincing force and produces in your mind conviction of the greater probability of truth, after you have considered all of the evidence in the case. [349]

Evidence may be either direct or indirect. Direct evidence is that which in itself, if true, conclusively establishes a fact. Indirect evidence is that which tends to establish a fact in dispute by proving another fact. Indirect evidence is of two kinds, namely, presumptions and inferences.

An inference is a deduction or conclusion which reason and common sense lead the jury to draw from facts which have been proved.

A presumption is an inference which the law requires the jury to make from particular facts. Unless declared by law to be conclusive, a presumption may be overcome or outweighed by direct or indirect evidence to the contrary of the fact presumed; but unless so outweighed, the jury are bound to find in accordance with the presumption.

Statements and arguments of counsel are not evidence in the case, unless made as an admission or stipulation of fact. When the attorneys on both sides stipulate or agree as to the existence of a fact, the jury must accept the stipulation as evidence and regard that fact as conclusively proved.

The evidence in the case consists of the sworn

testimony of the witnesses, all exhibits which have been received in evidence, all facts which have been admitted or stipulated, and all applicable presumptions stated in these instructions. Any evidence as to which an objection was [350] sustained by the court, and any evidence ordered stricken by the court, must be entirely disregarded.

You are to consider only the evidence in the case. But in your consideration of the evidence you are not limited to the bald statements of the witnesses. On the contrary, you are permitted to draw, from facts which you find have been proved, such reasonable inferences as seem justified in the light of your experience.

During the trial of this case certain testimony has been read to you by way of deposition. The testimony of a witness who for some reason cannot be present to testify from the witness stand is usually presented in the form of a deposition. Such deposition is entitled to the same consideration and, in so far as possible, is to be judged as to credibility and weighed by the jury in the same way as if the witness had been present.

Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce, and of the other to contradict; and therefore, if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust. [351]

You, as jurors, are the sole judges of the credi-

bility of the witnesses and the weight their testimony deserves. A witness is presumed to speak the truth. But this presumption may be outweighed by the manner in which the witness testifies, by the character of the testimony given, or by contradictory evidence. You should carefully scrutinize the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief. Consider each witness's intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or willful falsehood. If you find the presumption of [352] truthfulness to be outweighed as to any witness, you will give the testimony of that witness such credibility, if any, as you may think it deserves.

A witness may be discredited or impeached by contradictory evidence; or by evidence that at other times the witness has made statements which are inconsistent with the witness's present testimony.

If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness's testimony in other particulars; and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.

You are not bound to decide any issue of fact in accordance with the testimony of any number of witnesses which does not produce conviction in your minds, as against the testimony of a lesser number of witnesses or other evidence which does produce conviction in your minds.

The test is not which side brings the greater number of witnesses, or presents the greater quantity of evidence, but which witness and which evidence appeals to your minds as being most accurate and otherwise trustworthy. [353]

The testimony of a single witness, which produces conviction in your minds, is sufficient for the proof of any fact, and would justify a verdict in accordance with such testimony even though a number of witnesses may have testified to the contrary if, after weighing all the evidence in the case, you believe

that the balance of probability points to the accuracy and honesty of the one witness.

It is the duty of attorneys on each side of a case to object when the other side offers testimony or other evidence which counsel believes is not properly admissible. It is the duty of the court to decide whether, under the rules of evidence, such testimony or other evidence may be received.

Whenever the court has sustained an objection to an offer of evidence, the jury are not to consider in their deliberations the offer or the objection, or the ruling of the court in rejecting the offered evidence.

Thus when the court has sustained an objection to a question, the jury are to disregard the question, and may draw no inference from the wording of it or speculate as to what the witness would have said if permitted to answer. Nor may the jury assume an attorney has objected to a question because he expected the answer, if given, would be unfavorable to his side of the case. [354]

In allowing evidence to be introduced over the objection of counsel, the court does not, unless expressly stated, indicate any opinion as to the weight or effect of such evidence. As stated before, the jurors are the sole judges of the credibility of all witnesses and the weight and effect of all evidence.

The rules of evidence ordinarily do not permit a witness to testify as to his opinions or conclusions. A so-called expert witness is an exception to this rule. A witness who by education and experience has become expert in any art, science, profession or call-

ing may be permitted to state his opinion as to a matter in which he is versed and which is material to the case, and may also state the reasons for such opinion. You should consider each expert opinion received in evidence in this case and give it such weight as you think it deserves; and you may reject it entirely if you conclude the reasons given in support of the opinion are unsound.

The nature and extent of the injuries, if any, which proximately resulted from an accident may not be proved by evidence of statements as to aches, pains or injuries made to a doctor in connection with the doctor's observation, examination or treatment. Such statements are received in evidence for the purpose of enabling the doctor to tell you everything [355] upon which he may have based any opinion expressed as to a person's physical or mental condition.

The opinion of a doctor as to the condition of a patient may be based entirely upon objective symptoms revealed through observation, examination, tests or treatment; or the opinion may be based entirely upon subjective symptoms revealed only through statements made by the patient; or the opinion may be based in part upon objective symptoms and in part upon subjective symptoms.

To the extent that any opinion testified to by a doctor is based upon subjective symptoms stated to him by a plaintiff, the jury are entitled to consider the trustworthiness of such statements in determining the weight to be given the opinion.

We come now to a consideration of the principles

of law which relate more specifically to this particular case. The plaintiff, Dr. Hargrave, brought this action against the defendant, Mr. Wellman, for injuries alleged to have been sustained on June 23, 1956 while the plaintiff was riding a horse rented from the stables owned and operated by the defendant near Many Glacier Hotel at Glacier National Park. In my interrogation of the jurors on voir dire examination, I told you that the plaintiff alleged that the defendant was negligent in providing the plaintiff with a horse that was [356] unsuitable for the purpose and also in that Virgil Dillon, an employee of the defendant, without any warning, broke out in full speed with his mount, which caused the plaintiff's horse to suddenly bolt. I told you further that the defendant denied any negligence and also had pleaded contributory negligence of the plaintiff, and also that plaintiff voluntarily assumed any risks of injury which might result in connection with the ordinary risks incident to horseback riding. As counsel have told you in their arguments, the alleged negligence of the defendant in furnishing an unsuitable horse, and likewise the alleged contributory negligence of the plaintiff, are withdrawn from your consideration. Accordingly, as the case now stands, it is the contention of the plaintiff that the defendant Wellman, through his employee Dillon, was negligent in that on the return trip from Josephine Lake, Dillon suddenly and without warning to plaintiff, started his horse ahead at a full gallop, thereby causing plaintiff's horse to suddenly bolt and run; that plaintiff was unable to

stop his horse and that as a result of such negligence plaintiff suffered an injury to his back. Defendant denies that Dillon was negligent in any way, and contends that Dillon did not make his horse run. Defendant contends further that the plaintiff assumed the risks of an ordinary horseback ride, and that if plaintiff's horse did run, it did nothing more than any other suitable saddle horse would have done under the same or similar circumstances. Defendant also denies the injuries to plaintiff's back. [357]

The mere fact that an accident happened, considered alone, does not support an inference that either party to this action was negligent.

In order to establish the essential elements of plaintiff's case, the burden is upon the plaintiff to prove, by a preponderance of the evidence, the following facts: First, that the defendant was negligent as alleged; and second, that the defendant's negligence was a proximate cause of any injuries and consequent damages sustained by the plaintiff.

During these instructions, I will refer from time to time to the term "negligence," "ordinary care," and "proximate cause." What do we mean by these terms?

Negligence is the doing of an act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, under the circumstances presented by the evidence. It is the failure to use ordinary care under the circumstances in the management of one's property or person.

Ordinary care is that care which persons of ordinary prudence exercise in the management of their own affairs in order to avoid injury to themselves or others. Ordinary care is not an absolute term, but a relative one. By this we mean [358] that in deciding whether ordinary care was exercised in a given case, the conduct in question must be considered in the light of all the surrounding circumstances, as shown by the evidence.

The proximate cause of an injury is a cause which, alone or in conjunction with other causes, produced the injury, and without which it would not have occurred. Thus an act or omission of a person which sets in operation some thing that brings about an injury is held to be the proximate cause of the injury, unless the causal force of the act or omission has been broken by some new or intervening cause prior to the injury.

This does not mean that the law recognizes only one proximate cause of an injury, consisting of only one factor or thing, the conduct of only one person. To the contrary, many factors or things, the conduct of two or more persons, may operate concurrently, either independently or together, to cause an injury; and in such a case, each is regarded in law as a proximate cause.

The operator of a riding stable used by the public generally has a duty to exercise ordinary care. The standard of care required in a case of this nature is what a reasonably prudent and careful person, under the same or similar circumstances, would have exercised. [359]

If you find from a preponderance of the evidence that on the return trip from Lake Josephine, Virgil Dillon, without warning to plaintiff, caused his horse to break into full speed as alleged, which in turn caused plaintiff's horse to bolt and run, and that a reasonably prudent and careful person under the same circumstances would not have done so, and that this act of Dillon was a proximate cause of the accident and the resulting injuries to plaintiff, then your verdict must be for the plaintiff.

Unless, however, you find from a preponderance of the evidence (1) that Dillon caused his horse to break out in full speed; and (2) that the running of Dillon's horse also caused plaintiff's horse to run, and (3) that under the circumstances Dillon should have warned plaintiff that his horse was going to run, then you must return your verdict for the defendant.

As I have heretofore stated, in order to return a verdict for the plaintiff, you must find that the negligence, if any, on the part of Dillon was the proximate cause of the injury or condition complained of by plaintiff. The negligence of a person cannot be the proximate cause of injury to another unless under all of the attending circumstances, ordinary prudence would have admonished the person sought to be charged with negligence that his act or omission would probably result [360] in injury to someone. The general test as to whether negligence is the proximate cause of an accident is therefore said to be whether it is such that a person of ordi-

nary intelligence should have foreseen that an accident was liable to be produced thereby.

The defendant was not an insurer of the safety of the plaintiff. A person who rides a horse hired for that purpose assumes or takes upon himself the ordinary risks incident to such riding. The plaintiff assumed all risks which he knew or, in the exercise of ordinary care, should have known, were inherent in the trip. But the plaintiff did not assume any additional risks which were proximately caused by the failure of the defendant, if any, either before or at the time of the accident, to exercise ordinary care under the circumstances.

In other words, if the plaintiff's horse suddenly started running, as alleged, it is then a question of whether that running was one of the ordinary risks incident to horseback riding under the circumstances of this case. If you find from the evidence that the running of plaintiff's horse was caused by negligence of Virgil Dillon, as defined elsewhere in these instructions, then that was not a risk assumed by the plaintiff. If you find from the evidence that plaintiff knew or, in the exercise of ordinary care should have known that a suitable saddle horse might start running in that manner, then that was a risk which was assumed by the plaintiff. [361]

If, adhering to the court's instructions, you find that plaintiff is entitled to a verdict against the defendant, it then will be your duty to award the plaintiff such amount of damages as will compensate him reasonably for all detriment suffered by

him and of which defendant's negligence, as found by you, was a proximate cause. Instructions as to damages are given to be applied only in case you find the plaintiff is entitled to a verdict on the evidence. They have no application where, upon consideration of the whole case, the liability of the defendant has not been established, nor should they be understood by the jury as conveying any intimation that in the opinion of the court the plaintiff is or is not entitled to damages. That is the sole province of the jury. Instructions as to the measure of damages are intended for your guidance, in the event you find from the evidence in favor of the plaintiff.

The burden rests upon the plaintiff to prove by a preponderance of the evidence the elements of his damage. You are not permitted to award the plaintiff speculative damages, by which is meant compensation for future detriment which, although possible, is remote, conjectural, or speculative. However, should you determine that the plaintiff is entitled to recover, you should compensate him for future detriment, if a preponderance of the evidence shows such a degree of probability of that detriment occurring as amounts to a [362] reasonable certainty that it will result from the injuries in question.

The amounts of damages alleged in the complaint which have been suffered by the plaintiff are merely claims and not evidence, and must not be considered by you as evidence or accepted by you as any criterion as to the damages sustained by the plaintiff

in the event you find for the plaintiff; except that the amount of damages alleged in the complaint does fix a maximum limit, and you are not permitted to award the plaintiff more than the amount demanded in the complaint.

If you find from the evidence and under these instructions that plaintiff is entitled to a verdict, in computing the amount of damages you will take into consideration the nature and extent of the injuries sustained by plaintiff and will consider the following elements of damage:

1. The reasonable value of the time lost by plaintiff since his injury during which he was unable to pursue his profession. In determining this amount, you should consider evidence of plaintiff's earning capacity, his earnings, and the manner in which he ordinarily occupied his time before the injury, and find that he was reasonably certain to have earned during the time lost had he not been disabled;

2. Such sum as will reasonably compensate plaintiff for any loss of earning power which he is reasonably certain to suffer in the future. The measure of damages for impairment [363] of earning capacity is the difference between the amount which the plaintiff was capable of earning before his injury and that which he was capable of earning thereafter. In fixing this amount, you may consider what plaintiff's health, physical ability and earning power were before the accident and what they are now, the nature and extent of his injuries, whether or not they are reasonably certain to be permanent,

all to the end of determining the effect of his injuries upon his future earning capacity and the present value of the loss so suffered. Before damages can be awarded for loss of earning capacity it, of course, must first be found that the plaintiff's earning capacity has been impaired by the injuries received through the defendant's acts or omissions.

3. Such sum as will compensate plaintiff reasonably for physical and mental strain and suffering, if any, endured by him and proximately resulting from the injuries in question and for such like detriment, if any, as he is reasonably certain to suffer in the future from the same cause. The law does not prescribe any definite standard by which to compensate an injured person for pain and suffering, nor does it require that any witness should have expressed an opinion as to the amount of damages that would compensate for such injuries. The law does require, however, that when making an award for pain and suffering, the jury shall exercise its authority with sound discretion, and that the damages shall be just and reasonable in the light of the evidence. [364]

According to the American Experience Table of Mortality, the expectancy of life of one aged 54 years is 18.09 years. This fact is in evidence and may be considered by you in arriving at the amount of damages, if any, sustained by the plaintiff for loss of future earnings and future pain and suffering, in the event you find that plaintiff is entitled to recover for these items of damage. Standard mortality tables showing the expectancy of life

at a given age are competent evidence, but are not conclusive or controlling, and are merely matters of evidence which you may take into consideration with other evidence bearing on the same issue, such as occupation, health, habits, and activities of the person involved and the infirmities of advancing age. You are not entitled to compute a figure for pain and suffering and multiply it by the number of years which the plaintiff may live and thus reduce that amount to a sum certain for the present.

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only [365] after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

You are not partisans. You are judges—judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

Upon retiring to the jury room, you will select one of your number to act as foreman. The fore-

man will preside over your deliberations and will be your spokesman in court.

Forms of verdict have been prepared for your convenience. (Forms of verdict were read by the court at this time.)

You will take these forms to the jury room and when you have reached unanimous agreement as to your verdict, you will have your foreman fill in, date and sign the form which sets forth the verdict upon which you agree; and then you will return with your verdict to the court room.

If it becomes necessary during your deliberations to communicate with the court, you may send a note by the bailiff. But bear in mind you are not to reveal to the court [366] or to any person how the jury stands, numerically or otherwise, until you reach a unanimous verdict.

It is proper to add this caution: Nothing that I have said during the course of this trial, no ruling I have made, and nothing contained in these instructions should suggest or convey in any way or manner any intimation as to what verdict I think you should find. If, during the trial, I have said or done anything which has suggested to you that I am inclined to favor the position of either party, you should not be influenced by such suggestion. What your verdict shall be is the sole and exclusive duty and responsibility of the jury.

The Court: Counsel now will be given an opportunity to take exception to the Court's charge.

Mr. Blewett: Your Honor, I may be wrong on this, but do the rules provide it has to be done in the presence of the jury?

The Court: I don't think so.

Mr. Blewett: I would like to have it stipulated.

Mr. Kouri: It is stipulated.

The Court: No, there was some question about it. I think it reads it must be done outside the hearing of the jury. [367] In some districts it is and some it isn't. But anyway, let the record show it is stipulated that the exceptions may be taken outside of the presence of the jury.

(At this time Court and counsel retired to chambers to take the exceptions to the Court's instructions to the jury.)

Exceptions to Instructions

Mr. Kouri: Now comes the plaintiff and objects and excepts to the Court's charge, more particularly to the Court failing to charge the jury upon the law of bailment, which charge was tendered to the Court in writing timely, prior to the preparation of the charge of the Court as a whole. The plaintiff further objects to the charge for the reason that it fails to charge on the question of the defendant being a common carrier, which instruction was timely prepared and presented by the plaintiff. The plaintiff further objects and excepts to the instruction of assumed risk given by the Court;

for the reason that said instruction does not correctly state the law in that it fails to reveal that the law of assumed risk cannot be applicable if the plaintiff was not in any way at fault. The plaintiff further objects to the failure of the Court in his main charge to give the definition of or what an invitee is, which term and instruction was properly prepared and presented to the Court prior to the preparation of the main charge. [368]

Mr. Blewett: I have none.

(At this time Court and counsel returned to open court.)

The Court: Well, at this time Mr. Baumgartner the alternate juror will be excused. (Alternate juror excused.) Then I will ask the clerk to swear the bailiffs.

(The bailiffs were sworn at this time to take charge of the jury.)

The Court: Now, ladies and gentlemen of the jury, you will be in custody of the bailiffs who have just been sworn, and all of the exhibits which have been received in evidence will be available for you in the jury room. You will now retire to the jury room for your deliberation. The court will be in recess subject to call to take your verdict. [369]

* * * * *

[Endorsed]: Filed May 18, 1959.

[Endorsed]: No. 16483. United States Court of Appeals for the Ninth Circuit. Robert L. Hargrave, Appellant, vs. E. G. Wellman, doing business as Wellman Enterprises, Appellee. Transcript of the Record. Appeal from the United States District Court for the District of Montana.

Filed: May 21, 1959.

Docketed: May 29, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16483 Civil

ROBERT L. HARGRAVE, Appellant,

vs.

E. G. WELLMAN, D/B/A WELLMAN ENTER-
PRISES, Appellee.

STATEMENT OF POINTS AND DESIGN-
NATION OF RECORD

Comes now the Appellant, Dr. Robert L. Hargrave, and pursuant to Rule 17, Subsection 6, would file this his designation of points relied upon for appeal and designation of the record to be printed and distributed by the Honorable United States Court of Appeals for the Ninth Circuit.

Points Relied Upon for Appeal

I.

The Honorable District Court erred in submitting to the jury the doctrine of assumption of risk, in that the doctrine would not apply unless the particular condition of peril had continued long enough so that the person alleged to have assumed the risk could have known or would have been charged with knowledge of the danger.

II.

The Honorable District Court erred in failing to submit the written instructions, which were timely submitted, relative to the law of bailment, in that the undisputed evidence raised such instruction and issue.

III.

The Honorable District Court erred in failing to submit the written instructions, which were timely submitted, relative to the law pertaining to common carriers, in that the undisputed evidence raised such instructions and issues.

IV.

The Honorable District Court erred in failing to submit the written instructions, which were timely submitted, relative to the law pertaining to invitees, in that the undisputed evidence raised such instructions and issues.

V.

The Honorable District Court erred in failing to submit the written instructions, which were timely submitted, relative to the law pertaining to implied warranties, in that the undisputed evidence raised such instructions and issues.

VI.

The Honorable District Court erred in failing to submit written instructions and issues, which were timely submitted, relative to the application of the law of contributory negligence, as defined and tendered by the Plaintiff.

VII.

The Honorable District Court erred in failing to allow Plaintiff to amend his complaint, under and by virtue of Rule 15(b), which would not have worked a surprise upon the Defendant, nor would it have operated as a hardship to the Defendant.

Designation of the Record for Printing

(1) Plaintiff's Original and Amended Complaint filed herein.

(2) Defendant's Answer.

(3) All of Plaintiff's exhibits.

(4) All of Plaintiff's written tendered instructions and issues upon the law of bailment, the law pertaining to common carriers, the law pertaining to invitees, the law pertaining to implied warran-

ties, and the law of contributory negligence as defined by the Plaintiff.

(5) The Court's Charge and instructions to the jury.

(6) Verdict of the jury.

(7) Judgment of the Court.

(8) Notice of Appeal.

(9) Points Relied upon for Appeal herein.

(10) Praecipe and Designation of the Record and service thereon.

(11) Certificate of the Clerk.

(12) Cost Bond.

(13) Transcript of the Testimony.

(14) Objections of the Plaintiff to charge of the Court.

(15) Those portions of the Statement of Facts as typed by the official Court Reporter, Don W. Larsen, and contained in the typewritten statement of facts from Page 8, Line 13 and continuing unto Page 283, Line 6; beginning at Page 294, Line 9 and continuing onto Page 369, Line 15.

That such transcript of the record is to be printed in conformity with the Rules of Civil Procedure and filed of record with the Clerk of the United

States Court of Appeals for the Ninth Circuit, San Francisco, California.

Respectfully submitted,

L. R. BRETZ,
KOURI AND BANNER,
/s/ By PHILIP S. KOURI,
Attorneys for Appellant
Robert L. Hargrave.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed June 10, 1959. Paul P. O'Brien, Clerk.



